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# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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No. 419

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

vs.

JOHN KEHOE

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT

---

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1939  
CERTIORARI GRANTED NOVEMBER 6, 1939



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## Before the United States Board of Tax Appeals

Docket No. 64609

JOHN KEHOE AND MRS. JOHN KEHOE (AMENDED TITLE: JOHN KEHOE AND WIFE, SARAH KEHOE), SEE ORDER OF DEC. 7, 1935, PETITIONERS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: Leo W. White, Esq., W. H. Gillespie, Esq., R. M. O'Hara, Esq. For Comm'r.: M. B. Leming, Esq., H. E. Lucas, Esq.

*Docket entries*

1932

Apr. 15—Petition received and filed. Taxpayer notified.

Apr. 16—Copy of petition served on General Counsel.

Jun. 15—Answer filed by General Counsel.

2 Aug. 22—Copy of answer served on taxpayer. General Calendar.

Oct. 3—Reply to answer filed by taxpayer. 10-4-32. Copy served.

1934

Jan. 17—Motion to set for hearing at Scranton, Pa., during last half of Feb. 1934 filed by General Counsel.

Jan. 25—Hearing set week beginning Feb. 26, 1934, at Scranton, Pa.

Feb. 9—Motion for 90 days continuance filed by taxpayer. 2-12-34 granted.

Feb. 9—Stipulation for continuance and to set for hearing May 21, 1934, filed.

Feb. 12—Order of continuance to May 21, 1934, for hearing in Scranton, Pa., entered.

Apr. 10—Motion to limit hearing filed by taxpayer.

Apr. 19—Order denying motion to limit issues entered.

May 7—Motion for a continuance of 90 days filed by taxpayer.

May 7—Opposition to motion for continuance filed by General Counsel.

May 15—Motion for continuance to some date in August 1934 filed by General Counsel.

May 17—Order of continuance to August 20, 1934, in Scranton, Pa., entered.

Jun. 13—Application for subpoena to Karl Bossert et al., filed by General Counsel. (21.)

Jun. 13—Subpoena to Karl Bossert et al., issued.

Aug. 7—Application for subpoena filed by taxpayer.

Aug. 8—Application for subpoena filed by taxpayer.

3 Aug. 8—Subpoenas (2) duces tecum—Homer S. Cummings, and Guy T. Helvering issued 8-9-34 subpoenas served.



1934

Aug. 10—Applications (10) for subpoenas to F. L. Schott filed by General Counsel.

Aug. 10—Subpoenas duces tecum issued.

Aug. 10—Applications for subpoena filed by General Counsel.

Aug. 10—Subpoenas to William H. Gillespie et al. issued.

Aug. 11—Application for subpoena duces tecum filed by General Counsel.

Aug. 11—Subpoena duces tecum issued.

Aug. 13—Application for subpoena duces tecum to Ludwin Reese et al. filed by General Counsel.

Aug. 13—Application for subpoena to Miss Sins et al. filed by General Counsel.

Aug. 13—Subpoenas duces tecum to Ludwig Reese et al. issued.

Aug. 13—Subpoenas to Miss Sins issued.

Aug. 15—Application for subpoena to James Morgan filed by taxpayer.

Aug. 15—Subpoena to James Morgan issued.

Aug. 15—Notice of appearance of W. H. Gillespie as counsel filed.

Aug. 20—Hearing had before Mr. Turner on merits. Application for subpoena on Kingston Bank, Warren T. Acker and 1st National Bank—Plymouth National Bank filed. Subpoenas issued. Notice of appearance of R. M. O'Hara and W. H. Gillespie filed.

Aug. 21—Hearing had before Mr. Turner on merits.

Aug. 22—Hearing had before Mr. Turner on merits.

Aug. 23—Hearing had before Mr. Turner on merits.

Aug. 24—Hearing had before Mr. Turner on merits.

4 Aug. 27—Hearing had before Mr. Turner. Submitted. Three affidavits filed. Petitioner's brief due Oct. 26, 1934—20 days to reply. Respondent's brief due Oct. 26, 1934—20 days to reply. Interchange to be made by the Board.

Aug. 25—Transcript of hearing of August 24, 1934, filed. Volume 5.

Sep. 6—Transcript of hearing of August 22, 1934, filed. Volume 3.

Sep. 6—Transcript of hearing of August 20, 1934, filed. Volume 1.

Sep. 6—Transcript of hearing August 21, 1934, filed. Volume 2.

Sep. 6—Transcript of hearing of August 23, 1934, filed. Volume 4.

Sep. 6—Transcript of hearing of August 27, 1934, filed. Volume 6.

Oct. 11—Motion for extension of time to Nov. 26, 1934, to file brief filed by taxpayer. Granted.

Nov. 20—Motion for extension of 15 days to file briefs and 20 days thereafter for replies filed by General Counsel. 11-22-34 granted to 12-11-34.



1934

- Dec. 10—Brief filed by General Counsel.  
Dec. 11—Brief filed by taxpayer. 12-12-34 copy served.  
Dec. 17—Motion for extension of 30 days from January 1, 1935, to file reply briefs filed by taxpayer. 12-17-34 granted with leave to the respondent to file a reply brief on or before March 1, 1935.

1935

- Jan. 31—Reply brief filed by taxpayer. 2-1-35 copy served.  
Feb. 26—Reply brief filed by General Counsel.  
5 Dec. 7—Stipulation to change caption to read "Mrs. Sarah Kehoe" filed.  
Dec. 7—Order amending caption to read John Kehoe and wife Sarah Kehoe entered.

1936

- Mar. 10—Findings of fact and opinion rendered; Bolon B. Turner, Div. 8. As to John Kehoe, decision will be entered for respondent. As to Sarah Kehoe, decision will be entered for the petitioner.  
Mar. 12—Decision entered, Bolon B. Turner, Div. 8.  
Jun. 12—Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.  
Jun. 12—Proof of service filed by taxpayer.  
Aug. 8—Motion for extension to 10-10-36 to prepare and transmit record filed by taxpayer.  
Aug. 8—Order enlarging time to 10-10-36 to prepare and transmit record entered.  
Oct. 9—Motion for extension to 12-10-36 to prepare and transmit record filed by taxpayer.  
Oct. 9—Order enlarging time to 12-10-36 to prepare and transmit record entered.  
Dec. 7—Motion for extension to Feb. 10, 1937, to prepare and transmit record filed by taxpayer.  
Dec. 7—Order enlarging time to Feb. 10, 1937, to prepare and transmit record entered.

1937

- Jan. 29—Motion for extension to April 10, 1937, to prepare and transmit record filed by taxpayer.  
Jan. 29—Order enlarging time to April 10, 1937, to prepare and transmit record entered.  
Apr. 2—Motion for extension to July 10, 1937, to file statement and transmit record filed by taxpayer.  
6 Apr. 2—Order enlarging time to July 10, 1937, to prepare and transmit record entered.  
Jun. 22—Motion for extension to Oct. 10, 1937, to prepare evidence and transmit record filed by taxpayer.  
Jun. 22—Order enlarging time to 10-11-37 to prepare and transmit record entered.  
Sep. 20—Motion for extension to Jan. 10, 1938, to prepare evidence and transmit record filed by taxpayer.



1937

Sep. 20—Order enlarging time to Jan. 10, 1938, to prepare evidence and transmit record entered.

1938

Jan. 3—Motion for extension to March 10, 1938, to prepare evidence and transmit record filed by taxpayer.

Jan. 3—Order enlarging time to March 10, 1938, to prepare evidence and transmit record entered.

Feb. 24—Motion for extension to May 10, 1938, to prepare evidence and transmit record filed by taxpayer.

Feb. 24—Order enlarging time to May 10, 1938, to prepare evidence and transmit record entered.

Mar. 1—Certified copy of order from 3rd Circuit re form of statement of evidence for the record to the Circuit Court filed.

Apr. 23—Certified copy of order from 3rd Circuit enlarging the time to August 10, 1938, for settlement of evidence, transmission, and delivery of record filed.

July 16—Certified copy of order from 3rd Circuit ordering transmission of exhibits physically and exhibits to remain with Board until 15 days prior to the hearing, filed.

Aug. 10—Motion for extension to 9-9-38 to prepare and transmit record filed by taxpayer.

Aug. 10—Order enlarging time to 9-9-38 to prepare and transmit record entered.

Aug. 10—Agreed praecipe filed with proof of service thereon.

Aug. 10—Agreed statement of evidence lodged.

Aug. 13—Agreed statement of evidence approved and ordered filed.

Before United States Board of Tax Appeals

*Petition*

Filed April 15, 1932

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: E: Aj—TLS-6729—60D, dated February 24, 1932, and as a basis of this proceeding allege as follows:

1. Petitioners are individuals residing at 142 William Street, Pittston, Pennsylvania, they being husband and wife, and having filed a joint return of their income for the year 1925.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on February 24, 1932.

3. The taxes in controversy are income taxes for the year 1925 in the amount of \$208,043.36, and a fraud penalty of \$108,803.61, making a total proposed deficiency of \$316,846.97.



4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent has erred in asserting any deficiency against these petitioners or either of them for the year 1925, for the reason that a closing agreement in writing as authorized by Section 1106 (b) of the Revenue Act of 1926 was entered into between the petitioners and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, thereby preventing the reopening of petitioners' tax liability for 1925 or the determination and assessment of any further deficiency in taxes for that year.

(2) The respondent has erred in asserting any deficiency against these petitioners or either of them for the year 1925, for the reason that the determination, assessment, and collection of any additional taxes for the year 1925 against these petitioners are barred by the Statute of Limitations.

(3) The respondent has erred in asserting any deficiency against the petitioner, Mrs. John Kehoe, for the year 1925, for the reason that she has no additional taxable income from any source whatsoever in the year 1925 in excess of that on which income tax has heretofore been paid.

(4) The respondent has erred in adding to net income as shown on the joint return filed by these two petitioners for the year 1925 an amount of \$890,000.00 representing income alleged to have been received from the operation of the P. F. McGowan Brewery at Edwardsville, Pennsylvania.

(5) The respondent has erred in asserting any liability against these petitioners or either of them in the form of a 50% penalty for the year 1925 in accordance with Section 275 (b) of the Revenue Act of 1926.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) On or about March 15, 1926, the petitioners, being husband and wife, duly filed a joint return of their income on Form 1040 provided therefor by the Bureau of Internal Revenue.

10 In said joint return there was shown a total taxable income of \$19,198.33, and the tax computed thereon of \$194.56 was duly paid by said petitioners to the Collector of Internal Revenue at Scranton, Pennsylvania, on March 15, 1926.

(b) Thereafter, and about the month of September 1927, an investigation was made by a representative of the Bureau of Internal Revenue of the income tax liability of these petitioners for various years, including the year 1925. As a result of that investigation a report was prepared and forwarded to the Commissioner of Internal Revenue at Washington, D. C., on or about September 19, 1927, showing a total tax liability for 1925 of



\$9,758.42, and recommending the assessment against these petitioners of an additional tax for the said year in the amount of \$9,563.86. In the computation of such additional tax liability, the representative of the Bureau of Internal Revenue increased the taxable income for 1925 from \$19,198.33, as shown in the original joint return filed by petitioners, to an alleged taxable income of \$73,188.79.

(c) Neither of these petitioners then conceded, nor do they now concede, the correctness of the addition to income resulting in said additional tax liability. Both petitioners did, however, execute a waiver of their right to file a petition with the United States Board of Tax Appeals, and thereafter, and on October 20, 1927, there was mailed to these petitioners by C. B. Allen, Deputy Commissioner of Internal Revenue, a notice of the said deficiency in tax for 1925, in the amount of \$9,563.86.

(d) Thereafter, and during the month of November 11 1927, said additional tax of \$9,563.86, plus interest thereon of \$873.32, was assessed against these petitioners, and the additional tax and interest aggregating \$10,437.18 was, on November 15, 1927, duly paid by the petitioners to the Collector of Internal Revenue at Scranton, Pennsylvania.

(e) Following the assessment and payment of the aforementioned additional tax and interest of \$10,437.18, an agreement in writing was entered into between petitioners and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, pursuant to the provisions of Section 1106 (b) of the Revenue Act of 1926, whereby it was mutually agreed that the total liability for tax, interest, and penalty due the United States from said petitioners for the years 1923, 1925, and 1926, was \$26,184.79, and that such taxes and interest had been assessed and paid by the petitioners, and that such determination and assessment should be final and conclusive. The said total liability for the aforesaid three years of \$26,184.79 represented the total liability which had been determined and assessed by the Commissioner and paid by the petitioners in the following amounts:

Year	Total tax liability	Interest thereon	Total
1923	\$1,832.31	\$385.01	\$2,217.32
1925	9,758.42	873.32	10,631.74
1926	13,208.73	127.00	13,335.73
Totals	\$24,799.46	\$1,385.33	\$26,184.79

(f) Said agreement as to final determination and assessment of tax was executed by both petitioners on December 27, 1927, and by D. H. Blair, Commissioner of Internal Revenue,



12 on January 25, 1928; and was approved by Henry Herrick Bond, Acting Secretary of the Treasury, on January 27, 1928.

(g) Neither of the petitioners was guilty of any fraud, malfeasance, or misrepresentation of fact materially affecting the determination or assessment made for the year 1925 which was the subject matter of the said agreement as to final determination and assessment of tax.

(h) Section 277 (a) (1) of the Revenue Act of 1926, which is applicable to the year 1925, provides that additional taxes imposed by said Act shall be assessed within three years after the return was filed. The three year period for the assessment of any additional tax against these petitioners on account of their 1925 return expired March 15, 1929. No one of the conditions by which the provisions of Section 278 of the Revenue Act of 1926 would make inoperative the Statute of Limitations as provided in Section 277, or would extend the time for assessment of additional taxes, was present in the case of the liability of these petitioners, or either of them, for additional taxes for the year 1925.

(i) In respondent's notice of deficiency from which this appeal is taken, he has computed a total taxable income of \$909,198.33, that being the amount reported on petitioners' joint return of \$19,198.33, plus the sum of \$890,000.00 representing income alleged to have been received from the operation of the P. F. McGowan Brewery.

(j) Respondent in his notice of deficiency has not shown what portion of the alleged additional income of \$890,000.00 has been determined by him to be income of John Kehoe, one of the petitioners, and what portion thereof has been determined by 13 him to be income of Mrs. John Kehoe, the other petitioner. Since the mailing of said deficiency notice, however, and on March 4, 1932, an indictment was found against John Kehoe by a grand jury sitting in the District Court of the United States for the Middle District of Pennsylvania at Scranton, Pennsylvania, charging the said John Kehoe, inter alia, with the crime of attempting to defeat and evade income tax upon his net income for the year 1925, such tax being imposed by the Revenue Act of 1926. Said indictment is on file in the Office of the Clerk of said Court at Scranton, Pennsylvania, as No. 7497, March Term, 1932, and a reference thereto shows that the said John Kehoe is charged with having received in 1925 a net taxable income of \$929,198.33, which sum is made up of the net taxable income of \$19,198.33 disclosed in the joint return filed by said John Kehoe and his wife, and the further sum of \$910,000.00, representing additional income alleged to have been received



by John Kehoe from the operation of the P. F. McGowan Brewery.

Wherefore, the petitioners pray that this Board may hear the proceeding and

A. Find and rule that there is no deficiency in the taxes of these petitioners, or either of them, for the year 1925.

B. Find and rule that the respondent is precluded from determining and assessing any deficiency in tax against these petitioners, or either of them, for the year 1925, for the reason that under the authority of Section 1106 (b) of the Revenue Act of 1926, the petitioners and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, have entered into an agreement in writing that the previous determination and assessment of taxes for the year 1925 was final and conclusive.

C. Find and rule that no additional taxes, or additions thereto as provided by law, can now be determined and assessed against these petitioners, or either of them, for the year 1925, for the reason that such determination and assessment is barred by the Statute of Limitations.

D. Find and rule that the joint return of these petitioners for the year 1925 was not a false and fraudulent return, and that no penalties on account of alleged fraud should be imposed upon these petitioners, or either of them.

E. And grant such other and further relief as the Board may deem just and proper.

LEO W. WHITE,

*Counsel for Petitioners,*

*216-218 Dime Bank Trust Bldg., Pittston, Pa.*

15. [*Duly sworn to by John Kehoe and Mrs. John Kehoe; jurat omitted in printing.*]

*Exhibit A to petition*

TREASURY DEPARTMENT,

*Washington, Feb. 24, 1932.*

Office of Commissioner of Internal Revenue

Mr. and Mrs. JOHN KEHOE,

*143 William Street, Pittston, Pennsylvania.*

SIR AND MADAM: You are advised that the determination of your tax liability for the year 1925 discloses a deficiency of \$316,846.97, tax and penalty, as shown in the statement attached.



In accordance with section 274 of the Revenue Act of 1926, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

Respectfully,

DAVID BURNET,  
*Commissioner.*

By (Signed) J. C. WILMER,  
*Deputy Commissioner.*

Enclosure: Statement.

16

# STATEMENT

IT: E: AJ.  
TLS-6729-60D.

In re: Mr. and Mrs. John Kehoe, 143 William Street, Pittston, Pennsylvania.

Year, 1925; tax liability, \$217,801.78; tax assessed, \$9,758.42; deficiency, \$208,043.36; penalty, \$108,803.61; total deficiency, \$316,846.97.

Net income reported ..... \$19,088.33

Add: (a) Other income not reported from operation of the  
P. F. McGowan Brewery, of Edwarsville, Pa. .... 890,000.00

Corrected net income ..... \$909,198.33

Less:

Exemption ..... \$6,300.00

Dividends ..... 12,456.13 18,756.13

Balance subject to normal tax ..... \$800,442.20

Tax at 1½% on \$4,000.00 ..... \$60.00

Tax at 3% on \$4,000.00 ..... 120.00

Tax at 5% ..... 44,122.11

Surtax ..... 173,499.67

Total ..... \$217,801.78

Tax previously assessed:

original ..... \$194.56

additional ..... 9,563.86 9,758.42

Deficiency ..... \$208,043.36

17 50% penalty in accordance with section 275 (b) of the  
Revenue Act of 1926 (\$217,801.78—\$194.56) ..... \$108,803.61

## EXPLANATION OF CHANGES

(a) This item represents additional income received and not reported in your income tax return for this year.

The Secretary of the Treasury has approved the setting aside of the final closing agreement entered into for this year under the provisions of section 1106 of the Revenue Act of 1926.



*Answer*

Filed June 15, 1932

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue and for his answer to the within petition sets forth as follows:

1. Admits the petitioners are individuals residing at 143 William St., Pittston, Pa.; admits they are husband and wife.
2. Admits the notice of deficiency was mailed to the petitioners on February 24, 1932, and that a copy of the same is attached to the petition marked Exhibit A.
3. Admits the taxes in controversy are income taxes for the year 1925 in the amount of \$208,043.36 and a fraud penalty of \$108,803.61, making the total proposed deficiency \$316,846.97.
4. Denies that any error was committed as alleged in paragraph 4 of the petition.
5. Denies the allegation contained in subdivision (a) of paragraph 5 of the petition and alleges that on March 15, 1926, petitioner John Kehoe filed an income tax return for the calendar year 1925 whereon he answered in the affirmative the question, "Is this a joint return of husband and wife?" and the respondent further alleges that said return was executed and signed by said John Kehoe and by no other person; the respondent admits the said return showed a total taxable income of \$19,198.33 and a tax of \$194.56 and admits that the said sum of \$194.56 was paid to the Collector of Internal Revenue at Scranton, Pa., March 15, 1926.
- 5 (b), (c), (d), (e), (f). Admits that about the month of September 1927 a representative of the Bureau of Internal Revenue made an investigation of the income tax liability of said petitioners for the year 1925; admits that the report of the investigation was prepared and forwarded to respondent at Washington, D. C., on about September 19, 1927, admits that the report showed a total tax liability (inclusive of the amount shown on the aforesaid return) of \$9,758.42 for said year or an additional tax for said year of \$9,563.86; admits that in the computation of such additional tax liability the representatives of the Bureau of Internal Revenue increased the taxable income for 1925 from \$19,198.33 as shown by the aforesaid return to \$73,188.79; but denies that neither of the petitioners then conceded the correctness of the additional income resulting in the additional tax liability of \$9,563.86 last above mentioned; admits



a notice of deficiency in tax of \$9,563.86 for 1925 was mailed to petitioners October 20, 1927, and admits petitioners executed a waiver of right to file a petition with the United States Board of Tax Appeals in respect of the same; admits that during the month of November 1927 the additional tax of \$9,563.86 plus interest thereon of \$873.32 was assessed against the petitioners and was paid to the Collector of Internal Revenue at Scranton, Pa., November 15, 1927; admits that after the assessment and payment of the aforementioned additional tax and interest of \$10,437.18 an agreement in writing was entered into between petitioners and the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury whereby it was agreed that the total liability for tax and interest due the United States from said petitioners for the year 1925 was \$10,631.74 (being the amount of \$194.56 shown on the return plus an additional tax of \$9,563.86, plus interest of \$873.32) and that such taxes and interest was assessed and paid; admits said so-called agreement as to final determination was executed by petitioners December 27, 1927, and by the Commissioner of Internal Revenue January 25, 1928, and approved by the Acting Secretary of the Treasury January 27, 1928, but the respondent alleges that the so-called agreement as to final determination was false and fraudulent by reason of the fact that said John Kehoe, at the time of the execution of said so-called agreement and prior and subsequent to the execution thereof, wilfully, knowingly, and deceitfully withheld from the respondent any and all information concerning income derived by him from the operation of a brewery during the year 1925, commonly known in the year 1925 as the P. F. McGowan Brewery; that at the time of the execution of said so-called agreement as to final determination the petitioner John Kehoe well knew he had derived and received gains, profits, and income from the operation of said brewery during the calendar year 1925 in excess of \$890,000; that at the time of the execution of the so-called agreement as to final determination respondent was unaware of the receipt by petitioner John Kehoe during the year 1925 of the sum of \$890,000 or any other sum in gains, profits, or income from the operation of said brewery by reason of the fact that said John Kehoe wilfully, knowingly, and deceitfully withheld any and all information from the respondent concerning the receipt of said gains, profits, and income from the operation of said brewery and mislead the respondent by representing that he had no other income than that allegedly reflected in the so-called agreement as to final determination; that the so-called closing agreement as to final determination was revoked and set aside by the Secretary of the Treasury for the reason that the Com-



missioner of Internal Revenue had been induced to enter into same by reasons of the fraud and deceit of the petitioner John Kehoe.

5 (g). Admits that the petitioner Mrs. John Kehoe was not guilty of any fraud, malfeasance, or misrepresentation of fact materially affecting the determination or assessment made for the year 1925 which was the subject matter of the aforesaid agreement as to final determination and assessment of tax, but denies that petitioner John Kehoe was not guilty of any fraud, malfeasance, or misrepresentation of fact materially affecting the determination or assessment so made for the year 1925 which was the subject matter of said agreement as to final determination and assessment of tax.

Further answering the respondent alleges that the income derived during the calendar year 1925 from the operation of the aforesaid brewery was not the income of petitioner Mrs. John Kehoe but that it was income of the petitioner John Kehoe.

5 (h). Denies the allegations contained in subdivision (h) of paragraph 5 of the petition.

Further answering the respondent alleges that in January 1924 petitioner John Kehoe entered into an agreement with one Patrick F. McGowan by which said McGowan became petitioner's employee; that said McGowan was employed by petitioner 22 on and after January 1924 and throughout the calendar year 1925; that in February 1924 petitioner John Kehoe arranged with one F. L. Schott of Kingston, Pa., for a lease to petitioner John Kehoe of Bartell's Brewery at Edwardsville, Pa.; that petitioner John Kehoe directed that the name of said Patrick F. McGowan be inserted in and used as the ostensible lessee of said brewery; that said McGowan was directed by petitioner to enter into a lease contract with said Schott for the lease of Bartell's Brewery for the use and benefit of petitioner John Kehoe; that the said lease was executed by said McGowan in his own name as a figure-head for petitioner John Kehoe; that said petitioner John Kehoe was the real and actual lessee and party in interest and said McGowan held the said lease for the sole use and benefit of said petitioner, John Kehoe; that petitioner John Kehoe began operating the said brewery in February 1924 and continued to operate the same throughout the calendar year 1925 under the style and name of the P. F. McGowan Brewery; that from and after January 1924 and throughout the calendar year 1925 petitioner John Kehoe paid said McGowan a salary of \$150 to \$200 per month for the use of said McGowan's name in the operation of the aforesaid brewery; that said McGowan did not perform any service for petitioner John Kehoe other than to permit the use of his said name as the ostensible lessee of said



brewery and said McGowan took no part in the operation of said brewery other than to permit the use of his said name by petitioner John Kehoe; that petitioner John Kehoe manufactured cereal beverages at the said brewery throughout the calendar year 1925 and sold approximately one-third of the output thereof in that year to one Wm. F. Loughran; that said

23 Wm. F. Loughran paid to petitioner John Kehoe and/or to his duly authorized agent, one Wm. F. McHugh, during the calendar year 1925 the sum of \$890,000 and more for cereal beverages so purchased by said Wm. F. Loughran from said petitioner John Kehoe; that said Loughran purchased approximately one-third of the output of cereal beverages of the said brewery during the calendar year 1925 and that the remainder of said output was sold by said John Kehoe to divers other persons to the respondent unknown; that said John Kehoe concealed and attempted to conceal his own identity as the real lessee and actual operator of said brewery; that said Kehoe knowingly, wilfully, and with intent to defeat and evade income taxes concealed and attempted to conceal from the respondent the fact of the receipt by him of \$890,000 and other sums from the operation of said brewery in the year 1925; that the income tax return filed by petitioner John Kehoe as aforesaid for the calendar year 1925 was false and fraudulent with intent to evade tax by reason of the concealment by said John Kehoe of the receipt by him of said sum of \$890,000 and other sums from the operation of said brewery in the year 1925.

5 (i). Admits that in the notice of deficiency from which this appeal is taken the respondent computed a total taxable income of \$909,198.33, being the amount of \$19,198.33 reported on the return as aforesaid, plus \$890,000 representing income alleged to have been received from the operation of the P. F. McGowan Brewery.

24 5 (j). Admits that on March 4, 1932, after the mailing of said notice of deficiency, an indictment was found against petitioner John Kehoe by the Grand Jury sitting in the District Court of the United States for the Middle District of Pennsylvania at Scranton, Pa., charging the said John Kehoe, inter alia, with the crime of attempting to defeat and evade income tax upon his net income for the year 1925; admits said indictment is on file in the office of the Clerk of said Court and admits that reference thereto shows that the said John Kehoe was charged with having received in 1925 a net taxable income of \$929,198.33 and admits that said sum is made up of the net taxable income of \$19,198.33 disclosed by the aforesaid return and a further sum of \$910,000 representing additional income alleged to have been received by petitioner John Kehoe from the



operation of the P. F. McGowan Brewery. Further answering, the respondent alleges that the said indictment was afterwards, to wit, on April 30, 1932, dismissed because it had not been returned within three years next after the Commission of the offenses charged therein.

Further answering, the respondent alleges that the entire sum of \$890,000 set forth in the deficiency letter as income derived from the operation of the P. F. McGowan Brewery of Edwardsville, Pa., was income derived and received by said petitioner John Kehoe in the year 1925 and that the same was not the income of his said wife.

The respondent by way of further answer to the petition herein denies every allegation of the same not elsewhere specifically admitted.

Wherefore, the respondent prays that the Board find and decide that the so-called closing agreement as to final determination entered into between the petitioners and respondent in October 1927 was induced by the fraud and deceit of petitioner John Kehoe and that said so-called agreement was and is void and of no effect and that the Board find and decide that the income-tax return of the petitioner John Kehoe was false and fraudulent with intent to evade tax and that assessment of the proposed additional taxes against said John Kehoe may be made at any time.

C. M. CHAREST,

*General Counsel,*

*Bureau of Internal Revenue.*

*Of Counsel:*

MASON B. LEMING,

*Special Attorney,*

*Bureau of Internal Revenue.*

t co.

6-15-32.

26

Before United States Board of Tax Appeals

*Reply*

Filed Oct. 3, 1932

Come now the above-named petitioners, through their attorney, Leo W. White, and for reply to the facts pleaded by the respondent in his answer to the petition in this proceeding, admit and deny as follows:

1, 2, 3, and 4. No new facts having been pleaded by respondent in the paragraphs numbered 1, 2, 3, and 4, petitioners make no reply thereto.



5 (a). Admit that on March 15, 1926, petitioner John Kehoe filed an income-tax return for the calendar year 1925 whereon he answered in the affirmative the question "Is this a joint return of husband and wife?"; and admit that the said return was executed and signed by the said John Kehoe and by no other person.

5 (b), (c), (d), (e), and (f). Deny that the agreement as to final determination of tax liability was false and fraudulent; deny that at the time of the execution of said final agreement, or prior or subsequent thereto, John Kehoe wilfully, knowingly, and deceitfully withheld from respondent any information concerning income alleged to have been derived by him during the year 1925 from the operation of a brewery known as P. F. McGowan Brewery, or from any other source; deny that at the time of the execution of said final agreement petitioner  
27 John Kehoe knew he had derived gains, profits, and income from any other source whatsoever in addition to the income included in arriving at the tax liability shown in the said final agreement; and deny that the said John Kehoe did in fact have gains, profits, or income during the year 1925 in excess of those included in the computation resulting in the total tax liability as shown in said final agreement; deny that at the time of the execution of said closing agreement petitioner John Kehoe deceived or misled the respondent in any manner whatsoever with respect to the amount of taxable income received by him for the year 1925, and denies that the said agreement as to final determination has been or can be revoked and set aside by the Secretary of the Treasury or any other officer, employee, or agent of the United States, for the reason that neither of the petitioners herein was guilty of any fraud or misrepresentation of a material fact in connection with the execution of the final agreement.

5 (g). Admit that the petitioner, Mrs. John Kehoe, derived no income during the calendar year 1925 from the operation of the so-called P. F. McGowan Brewery, and deny that petitioner John Kehoe derived any income from that source during the calendar year 1925.

5 (h). Deny each and every allegation of fact contained in paragraph 5 (h) of respondent's answer.

5 (i). No new facts having been pleaded by respondent in paragraph 5 (i) of respondent's answer, petitioners make no reply thereto.

5 (j). Admit that the indictment found against petitioner John Kehoe on March 4, 1932, was, on April 30, 1932, dismissed  
28 because it had not been returned within three years next after the commission of the offences charged therein.



Deny that petitioner John Kehoe derived income in the year 1925 from the operation of the P. F. McGowan Brewery of Edwardsville, Pennsylvania, either in the amount of \$890,000.00 or in any other amount, and admit that no income from the operation of the said brewery was received by petitioner Mrs. John Kehoe.

The petitioners in further reply to the respondent's answer herein deny every allegation of fact in respondent's answer not elsewhere specifically admitted.

Wherefore, the petitioners pray that the Board may hear this proceeding and find and rule that there is no deficiency in tax or penalties against these petitioners or either of them.

(s) LEO W. WHITE,  
*Counsel for Petitioners.*

29 [Duly sworn to by John Kehoe and Mrs. John Kehoe;  
jurat omitted in printing.]

Before United States Board of Tax Appeals

*Motion to limit the issues at hearing*

Filed April 10, 1934

The above named petitioners, through their counsel, Leo W. White, hereby move that at the trial of this proceeding, which is now set for hearing on May 21, 1934, at Scranton, Pennsylvania, the issues be limited to the following:

(1) Whether or not the closing agreement covering the year 1925, entered into under the authority of section 1106 (b) of the Revenue Act of 1926, is a valid agreement and thereby prevents the respondent from assessing against and collecting from these petitioners or either of them, any additional tax for the year 1925.

(2) Whether or not the assessment and collection of any additional tax against these petitioners or either of them for the year 1925 are now barred by reason of the provisions of section 277 (a) (1) of the Revenue Act of 1926, which provides that additional taxes imposed by said act shall be imposed within three years after the return has been filed.

30 The reasons for this motion are as follows:

On March 15, 1926, petitioner John Kehoe filed an income-tax return for the calendar year 1925 whereon he answered in the affirmative the question "Is this a joint return of husband and wife?" Said return was executed and signed by the said John Kehoe and by no other person. On December 27, 1927, the two petitioners and the Commissioner of Internal Revenue entered into an agreement as to final determination of tax lia-



bility following the payment of an additional tax for 1925 of \$9,563.86 plus interest thereon, which had been assessed following an examination of said 1925 return. This agreement was approved by the Acting Secretary of the Treasury on January 27, 1928.

Respondent in paragraph 5 (g) of his answer admits that the petitioner Mrs. John Kehoe was not guilty of any fraud, malfeasance, or misrepresentation of fact materially affecting the determination or assessment made for the year 1925, which was the subject matter of the aforesaid agreement; and on such admission the Board must enter an order finding there is no deficiency in tax against petitioner, Mrs. John Kehoe.

Respondent alleges, however, that the Commissioner of Internal Revenue had been induced to enter into said agreement by reason of the fraud and deceit of petitioner John Kehoe. Should the Board upon a hearing of the evidence upon this issue decide that petitioner John Kehoe was not guilty of fraud, malfeasance, or misrepresentation of fact materially affecting the determination which was the subject matter of the agreement, such finding alone would dispose of this proceeding.

31 Irrespective of the agreement as to final determination, the assessment and collection of any additional tax against petitioner John Kehoe for the year 1925 were barred by the Statute of Limitations at the time of the mailing of the deficiency notice on February 24, 1932. Respondent alleges that said return was false and fraudulent; but should the Board, following a hearing on this issue, find that said return was not false and fraudulent, such a finding would dispose of this proceeding.

Since a finding against respondent on either of the aforementioned issues, as to both of which the respondent has the burden of proof, would dispose of this proceeding, petitioners pray that this motion be granted, so as to make unnecessary a preparation by petitioners for a trial upon the merits, unless and until the Board shall find that the assessment and collection are not barred.

LEO W. WHITE,

*Counsel for Petitioner.*

216 Dime Bank & Trust Building, Pittston, Pennsylvania.

Dated April 7, 1934.

32 Before United States Board of Tax Appeals

*Order denying motion to limit the issues*

Filed April 19, 1934

This proceeding is set for hearing May 21, 1934, at Scranton, Pennsylvania, and petitioners have moved that the issues be limited as follows:



(1) Whether or not the closing agreement covering the year 1925, entered into under the authority of section 1106 (b) of the Revenue Act of 1926, is a valid agreement and thereby prevents the respondent from assessing against and collecting from these petitioners or either of them, any additional tax for the year 1925.

(2) Whether or not the assessment and collection of any additional tax against these petitioners or either of them for the year 1925 are now barred by reason of the provisions of section 277 (a) (1) of the Revenue Act of 1926, which provides that additional taxes imposed by said act shall be imposed within three years after the return has been filed.

Careful consideration has been given to said motion but it is believed that inasmuch as the Board is going to hold these hearings in the community where the petitioners reside and where all parties will have an opportunity to have their witnesses personally present, it will be best to hear the whole proceeding without any severance of issues.

33 Accordingly, petitioners' motion to sever issues is hereby denied.

[SEAL]

(Signed) EUGENE BLACK,  
Chairman.

Dated Washington, D. C., April 19, 1934.

Before United States Board of Tax Appeals

JOHN KEHOE AND WIFE, SARAH KEHOE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 64609. Promulgated March 10, 1936

34 B. T. A.—No. 9. 51102—36

*Findings of fact and opinion*

Filed March 10, 1936

1. Petitioner did not report on his income-tax return, for 1925, income received by him in that year from the sale of beer. Held, the return was false and fraudulent with intent to evade tax and the tax may be assessed at any time.

34 2. Petitioner entered into a final closing agreement with the Commissioner which was approved by the Acting Secretary of the Treasury, pursuant to section 1106 (b) of the Revenue Act of 1926, without disclosing his income from the sales of beer. Held, such failure to disclose income was fraudu-



lent and the closing agreement was properly set aside by the Commissioner.

3. The respondent having sustained the burden of proving that the return filed by the petitioner for 1925 was false and fraudulent with intent to evade tax and also of proving fraud in connection with the closing agreement, it is held that his determination of the deficiency is presumed to be correct and there being no proof that the deficiency as determined is erroneous, his determination is sustained.

4. The deficiency being due to fraud with intent to evade tax, the 50-percent penalty as determined by the respondent is sustained.

5. The petitioner, Sarah Kehoe, having pleaded the statute of limitations and the execution of a final closing agreement, and the respondent having failed to prove that a false or fraudulent return was filed by or for her and having admitted that none of the income herein was her income and that she was guilty of no fraud, malfeasance, or misrepresentation of a material fact in connection with the closing agreement, her claim of no deficiency is sustained.

R. M. O'Hara, Esq., Leo W. White, Esq., and W. H. Gillespie, Esq., for the petitioners.

35 M. B. Leming, Esq., and H. E. Lucas, Esq., for the respondent.

This proceeding involves a deficiency in income tax for the year 1925 in the amount of \$208,043.36 and a fraud penalty in the amount of \$108,803.61. The basis for the respondent's determination is that the petitioner, John Kehoe, was the operator of a brewery during the taxable year and that he failed to report in his income tax return substantial amounts of income received therefrom. It is contended on behalf of the petitioners that the statute of limitations against the assessment and collection of the deficiency in question had run prior to the mailing by the respondent of his notice of determination and, too, that a final closing agreement was signed by the parties and approved by the Acting Secretary of the Treasury on January 27, 1928, in accordance with the provisions of section 1106 (b) of the Revenue Act of 1926. The respondent has affirmatively alleged that the statute of limitations has not run for the reason that the return was false and fraudulent with intent to evade tax; and, further, that the closing agreement was fraudulent and of no force or effect. It is contended on behalf of the petitioner, Sarah Kehoe, sometimes referred to herein as Mrs. John Kehoe, that she received no income in 1925 from the operation of the brewery and was guilty of no fraud in connection with the closing agreement and for that reason an order of no deficiency should be entered



as to her. On this point the respondent admits the facts but contends that the liability for the deficiency and penalty is joint and several.

36

*Findings of fact*

The petitioners are husband and wife, residing at 143 William Street, Pittston, Pennsylvania. On March 15, 1926, an income tax return for the year 1925 was filed by John Kehoe, in the name of "Mr. and Mrs. John Kehoe" and stated on its face that it was a joint return of husband and wife. This return was executed and signed by John Kehoe only.

One of the business activities of petitioner John Kehoe during the taxable year was that of manufacturing and selling beer. Mrs. John Kehoe did not participate in the beer business and the word "petitioner" as hereinafter used refers to the petitioner, John Kehoe, unless otherwise specified.

On February 9, 1924, Patrick F. McGowan of Wilkes-Barre, Pennsylvania, was employed by the petitioner to make application for and procure if possible a permit from the Federal Government for the operation of a brewery located at Edwardsville, Pennsylvania, and generally known as Bartels Brewery. The petitioner advised McGowan that William F. McHugh, who was present at the time, would be in charge of the brewery and that he (McGowan) should follow the instructions given by McHugh, who in turn would receive his instructions from the petitioner. The petitioner then instructed McGowan to go with McHugh to sign a lease for the brewery. The lease, which was signed on the same date by McGowan, with McHugh as a witness, was in McGowan's name. Among other things it provided for a term of 10 months from March 1, 1924, and a consideration of \$30,000, payable \$3,000 monthly in advance. It was renewable at 37 the option of the lessee for a period of two years, at \$50,000 per year and certain other considerations.

Later in February 1924, McGowan was called to petitioner's office, where a conference was had between petitioner, McHugh, and McGowan concerning the brewery. Upon leaving, McGowan was instructed to take \$6,000 in cash from petitioner's desk. A bank account was opened with the Peoples National Bank of Edwardsville, Pennsylvania. Of the amount so deposited, \$3,000 was used as the initial payment on the rent due under the brewery lease, \$2,750 was paid for materials on hand at the brewery at the time it was taken over, \$150 was drawn by McGowan as his first month's salary, and the final \$100 was also drawn by McGowan for his personal use at the direction of the petitioner.

The option to renew the lease was exercised by notice signed by McGowan under date of October 30, 1924, and thereafter a



supplemental agreement for lease of the blacksmith and carpenter shops and ice plant used in connection with the brewery was entered into for the period from July 1, 1925, to December 31, 1926, at an additional rental of \$6,000 per year, payable \$500 monthly. The notice to renew and the supplemental lease were signed by McGowan pursuant to his employment by petitioner.

On the same day the lease was signed, February 9, 1924, McGowan, acting under the instructions of petitioner, subscribed and swore to an application for a permit to operate a dealcoholizing plant for the production of cereal beverages under the provisions of the National Prohibition Act. A bond in the penal sum of \$10,000 was given as required by the Prohibition Administration. The American Surety Co. of New York became  
38 surety on the bond. An indemnity agreement was required by the surety company where the principal in the bond was not financially responsible in the amount of the bond. Such an agreement was entered into for the protection of the surety company by petitioner and his brother, Thomas Kehoe, as indemnitors.

A permit was issued in McGowan's name on June 18, 1924, and was received by him on or about July 2, 1924.

Petitioner did not wait for the permit to issue but began the manufacture of beer immediately upon obtaining possession of the brewery under the lease of February 9, 1924. Two grades of beer were manufactured and sold. One grade was known as "near beer" while the other was commonly referred to as "high-powered" beer. The high-powered beer was put in barrels and shipped by rail. The near beer was bottled and sold locally, being hauled away from the brewery in wagons, trucks, and automobiles. The brewery started shipping high-powered beer about March 24, 1924. The railroad shipping point was Kingston, Pennsylvania.

In the latter part of 1924, prohibition agents confiscated four cars of beer from the brewery in the railroad yards at Kingston, Pennsylvania. This led to the revocation of the brewery permit.

Previously on July 28, 1924, McGowan, upon instructions from petitioner, had applied for a renewal of the brewery permit for the year 1925. This application was disapproved. Thereafter, a proceeding was brought in the District Court of the United States for the Middle District of Pennsylvania, No. 471, March term, 1925, in Equity. The action of the Federal authorities in revoking and canceling the permit and in refusing  
39 McGowan's application for a renewal was reversed and they were directed to approve the application for renewal. Thereafter a permit dated July 24, 1925, was issued by the Federal Prohibition Commissioner upon the renewal application. The



indemnity bond upon which the American Surety Co. of New York was surety and the indemnity agreement between the surety company and petitioner John Kehoe and Thomas Kehoe, under which the 1924 permit was issued, remained in force and effect for the year 1925. McGowan had nothing to do with the American Surety Co. making the bond and never paid any premiums thereon.

On December 28, 1935, McGowan, at the direction of petitioner, executed an application for the renewal of the brewery permit for the year 1926. A bond in the amount of \$25,000. was given in connection with the application. The American Surety Co. was surety and there was deposited with the bond, as collateral, a certificate of deposit in the amount of \$25,000. The certificate of deposit was issued by the Miners Savings Bank of Pittston, Pennsylvania, upon the execution of a joint note for \$25,000 in favor of the bank by petitioner John Kehoe and Thomas Kehoe.

In the latter part of 1926, petitioner John Kehoe informed McGowan that they were about to lose the brewery permit and that one John Carroll was going to make application for a permit. Petitioner instructed McGowan that when everything was ready, McHugh would notify him and that he was to turn the plant over to Carroll. Subsequently McGowan turned the plant over to Carroll on instructions from McHugh for a consideration of \$500 which McHugh instructed him to keep. Prior to February 28, 1927, McGowan was advised by petitioner that it was not possible to get a permit for Carroll. McGowan was instructed to sign a letter given by McHugh, notifying the prohibition department in Philadelphia to dispose of the beer on hand. This was done; the department disposing of 885 to 895 barrels of high-powered beer.

McGowan had no financial interest in the brewery nor in the contracts or leases taken in his name, but was employed and used by the petitioner to act as lessee of the brewery and apply for and hold permits under the National Prohibition Act for the operation thereof. The petitioner was the real party in interest. McGowan had no regular duties at the brewery, but usually came down during the forenoon to see if McHugh had instructions for him. Occasionally he stopped by in the afternoon. The petitioner was at the brewery only a few times during its operations under the lease but often conferred with McGowan and McHugh at his office in Pittston. He instructed McGowan to keep his mouth shut and to talk to no one about the brewery, and at times sent him on trips to New York, Philadelphia, and Atlantic City to get him away from the brewery; McGowan occasionally being followed by revenue men. The petitioner furnished the money for McGowan's expenses on these trips.



Petitioner paid McGowan a salary of \$150 per month up to the time he received the first permit to operate the brewery and thereafter \$200 per month. In September 1924, he caused an automobile to be purchased for McGowan and thereafter  
41 also caused an additional \$125 per month to be paid to McGowan until the automobile was paid for. McGowan's salary was always paid in cash except for the period from February 9 to March 9, 1924. For that period the salary was paid by check on the Peoples National Bank of Edwardsville, Pennsylvania, against the account previously described. Sometimes McGowan's salary was paid by petitioner and sometimes by McHugh. In December 1924, petitioner gave McGowan a Christmas present of \$2,000 in cash. From time to time he also paid him additional sums of money.

William F. McHugh was the manager of the brewery; Charles J. Locke was bookkeeper; Tom Kearns and Francis Kane were employed in the office; thirty-five or forty men were employed in the racking room and other parts of the plant. Carl Bossert was brew master.

Charles J. Locke was transferred in October 1924 to the brewery as bookkeeper, from similar employment with the Kehoe Electrical Construction Co., a business belonging to the petitioner and of which McHugh was manager. Prior to that employment he had installed the books for Indian Queen Bitters, another of the petitioner's enterprises. After transfer to the brewery he kept the books in the near-beer department. These books reflected no charges for freight on the high-powered beer shipped by rail, neither did they show receipts from the sale of such beer. All materials for the manufacture of near beer were put into an inventory and the books kept by Locke reflected all of the materials from the inventory account in every department.

A bank account was opened May 16, 1924, under  
42 McGowan's name in the West Side Trust Co., Kingston, Pennsylvania, for use in connection with the operation of the brewery. McGowan did not open the account, nor did he sign a signature card at the bank, nor write or sign any checks drawn on the account. Practically all, if not all, of the checks were drawn by Locke and signed in McGowan's name by William F. McHugh. This bank account disclosed deposits and withdrawals of approximately \$30,000 in 1925.

Locke made out income-tax returns for the years 1924, 1925, and 1926, in accordance with the books which he kept. These returns were made out in the name of Patrick F. McGowan and purported to show the profit or loss of the Patrick F. McGowan Brewery, sometimes known as Bartels Brewery. The total receipts from the business of manufacturing cereal beverages shown



on the return for 1925, in the amount of \$97,713.19, were from sales of near beer. The return did not reflect any amount from the sale of high-powered beer. It indicated a net loss of \$82,325.97. Certain books were kept by Francis Kane in the back office at the brewery. Occasionally Kearns worked with Kane. Locke had nothing to do with these books and they were not considered by him in making out the income-tax returns of the brewery which McGowan signed.

Harry Kenny was baggagemaster on a train of the Delaware, Lackawanna & Western Railroad running between Hoboken, New Jersey, and Kingston, Pennsylvania. In 1924, he purchased eight carloads of beer from petitioner for parties in Jersey City and Hoboken, who paid him a commission of from 43 \$50 to \$100 per car. The beer was shipped by rail from the Kingston Railroad yard. This was the rail shipping point of Bartels Brewery which was being operated by petitioner under the McGowan lease. Kenny paid petitioner for the beer in cash at about \$2,100 per carload of 100 barrels. In making the first payment, Kenny tendered a check but was directed by petitioner to take it down to the Miners Bank in Pittston and have it cashed. Kenny cashed the check and took the money back to petitioner.

The records of the Delaware, Lackawanna & Western Railroad Co. show that approximately 885 cars of cereal beverage were shipped by rail from Kingston, Pennsylvania, in 1925. A carload was approximately one hundred barrels. All of these cars were loaded at the McGowan brewery (Bartels Brewery) siding at Edwardsville, Pennsylvania. The total freight prepaid at Kingston on these carload shipments was approximately \$98,648.60. A large portion of the freight on the shipments was paid by William F. McHugh, Thomas Kehoe, or Thomas Kearns, some one of whom ordered the cars in which the said cereal beverage was shipped. The near beer sold for \$6 per barrel. This was approximately a uniform price. High-powered beer sold from \$12 to \$17 per barrel. It was carried on the brewery inventory at \$12 per barrel.

The income tax return filed on March 15, 1926, disclosed a total income-tax liability of \$194.56, which amount was paid. This return, which was signed and executed by petitioner John Kehoe, did not report any income from the McGowan brewery or from the sale of beer.

After an investigation by a representative of the Bureau 44 of Internal Revenue, the respondent, on October 20, 1927, sent to petitioners a notice of deficiency in tax for 1925, in the amount of \$9,563.86. The deficiency was assessed and paid November 15, 1927. Thereafter, an agreement in writing was



entered into between petitioners and the respondent, fixing the total liability for tax and interest for the year 1925 at \$10,631.74, which was made up as follows:

Amount returned-----	\$194. 56
Deficiency-----	9, 563. 86
Interest-----	873. 32
	<hr/> 10, 631. 74

This agreement was approved by the Acting Secretary of the Treasury January 27, 1928.

In June 1929, the respondent was informed that petitioner John Kehoe was the owner of the brewery business during the taxable year and on January 3, 1930, notified Kehoe in writing that it was necessary to make a further examination of his income-tax liability for 1925. On February 24, 1932, the notice of deficiency from which this appeal is taken was sent to petitioner. On February 13, 1933, the Acting Secretary of the Treasury made an order declaring a revocation of the closing agreement previously mentioned.

The income-tax return for the year 1925 was false and fraudulent with intent to evade tax, and the deficiency herein is likewise due to fraud with intent to evade tax. There was also a misrepresentation by the petitioner of material facts affecting the determination and assessment covered by the final closing agreement.

45 Petitioner Sarah Kehoe derived no income from the operation of the McGowan brewery during the taxable year and was not guilty of any fraud, malfeasance, or misrepresentation of fact materially affecting the determination or assessment made for the year 1925 on the basis of the return previously described herein, which was the subject matter of the agreement as to final determination and assessment of tax thereunder.

### *Opinion*

TURNER: It is admitted that the assessment and collection of the deficiency involved in this proceeding is barred by the provisions of section 277 (a) (1)<sup>1</sup> of the Revenue Act of 1926, unless the return filed by the petitioners for the taxable year was false and fraudulent with intent to evade tax, in which case the tax may be assessed at any time, under the provisions of section 278 (a)<sup>2</sup> of the same act. It is also admitted that the petitioners ex-

<sup>1</sup> SEC. 277 (a) Except as provided in section 278—

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

<sup>2</sup> SEC. 278 (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.



46 entered a final closing agreement in the form prescribed by section 1106 (b)<sup>3</sup> of the Revenue Act of 1926 and that the assessment and collection of the deficiency here in question is prohibited by that agreement, unless there was "fraud or malfeasance or misrepresentation of fact materially affecting the determination and assessment" of the tax covered by the agreement.

In support of his allegations that the income-tax return for the calendar year 1925 was false and fraudulent and the further allegation that petitioner John Kehoe was guilty of fraud, malfeasance, or misrepresentation of facts materially affecting the determination and assessment which formed the basis for the said final closing agreement, the respondent presented in evidence numerous documents and the oral testimony of a great number of witnesses. The petitioners presented no evidence or proof of any kind. Petitioner Sarah Kehoe rested her case on a motion for no deficiency on the respondent's admission that she derived no income from the brewery business and the further admission that she was not guilty of fraud in connection with the assessment and collection of the tax thereon. Petitioner John Kehoe asked for a finding of no deficiency upon the ground that the respondent had failed to sustain the burden of showing fraud, malfeasance, or misrepresentation of fact in connection with the final closing agreement, and further, that he had not sustained the burden of showing that the original return for 1925 was false or fraudulent.

The basic question in this case is one of fact and is whether or not petitioner John Kehoe was the real party in interest in the operation of the brewery at Kingston, Pennsylvania, commonly known as Bartels Brewery, but often referred to during the period here in question as the Patrick F. McGowan Brewery. It is strenuously argued that the respondent has failed to show any connection between petitioner John Kehoe and the operation of the brewery business, except through the testimony of Patrick F. McGowan, whose credibility is seriously questioned. On the other hand, the respondent has made much of the fact that petitioner John Kehoe was present throughout the hearing and failed to take the stand to refute the allegations made against him and to deny in any way whatsoever the statements made by the various witnesses which tended to show that he was the operator of the brewery.

<sup>3</sup> SEC. 1106 (b). If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance, or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.



Regardless of whether or not McGowan's testimony, standing alone, would be considered sufficient to sustain the respondent's allegations, and regardless of any inferences that might be drawn from the failure of the petitioner to take the stand or to present other evidence, the facts, circumstances, and happenings described and disclosed by documentary proof and the testimony of witnesses convince us that the petitioner was the real party in interest in the operation of the brewery during the taxable year. Furthermore, we had the opportunity to observe the witness McGowan on the stand, and we have carefully examined the transcript of his testimony, and we believe that McGowan told us the truth. Many of the specific events and happenings which make up the entire picture have been set forth in our findings of fact. Others might be described, such as the conference held in the office of Evan C. Jones, on the night in December 1924, just prior to the hearing on the revocation proceedings, when McHugh, the known manager of the brewery, introduced John Kehoe as his boss to the witness Mullaghy, yardmaster for the Lackawanna Railroad, who had been called in for a discussion of the circumstances surrounding the seizure of the four cars of beer in the railroad yards. However, there is no doubt in our minds that John Kehoe owned the brewery business, and a further recital of events or review of evidence to show his connection therewith would serve no useful purpose.

Further, the petitioner argues in substance that there is no direct evidence of the actual payment to him of money during the taxable year from the brewery or any other source and that regardless of the facts and circumstances that may be disclosed by the record, the respondent's charge of fraud fails. It is, of course, elementary that actual physical payment of money to the petitioner is not essential to a determination against him. We have found as a fact that the brewery business was his, and that McHugh, McGowan, and others were his employees. Any of the proceeds of the brewery business coming into their hands would be chargeable to the petitioner, regardless of whether he ever had actual physical possession of the money. It should also be kept in mind that the operation of the brewery at the time and in the manner described in this proceeding was extremely hazardous. The margin of profit was necessarily great, and success was largely dependent upon the ability of those so engaged to make no direct record in writing or otherwise of the things done and the transactions completed. It does not follow, however, that the absence of the usual written records and customary books of account showing the receipt of income means the absence of other proof equally as positive and convincing as any written record that might be presented.



That such is the situation here is clearly shown by a resume of some of the known facts. We know that the near-beer business was a front for the under-cover manufacture and sale of the so-called high-powered beer; that the records kept at the brewery covered only the near-beer business, the proceeds of which were not sufficient to keep the brewery open; that the freight on the high-powered beer shipped by rail was in excess of the entire sales shown on the brewery books; that the employees were paid a cash bonus of \$8 weekly, which was furnished by McHugh, and was not reflected in the books of account; that in spite of a loss of \$82,325.97, reflected by the brewery books for the year 1925, on a gross business of \$97,713.19, the petitioner was actively engaged in securing and did secure a renewal of the permit for operations in 1926; that on such a business only approximately \$30,000 is disclosed in the bank records during the taxable year; that with the exception of one month in 1924, McGowan's salary for the years 1924, 1925, 1926, and 1927 was paid in cash either by the petitioner or McHugh; that Harry Kenny paid cash to the petitioner for eight carloads of beer bought by him in 1924; that the price of high-powered beer, in 1925, ranged from \$12 to \$17 per barrel; that approximately 85 carloads of such beer were shipped from the brewery over the Delaware, Lackawanna & Western Railroad Co. lines in 1925; that freight on these shipments in the approximate amount of \$98,648.60 was paid in cash by McHugh, Kearns, and Tom Kehoe; that a carload of beer was 50 approximately one hundred barrels, and by applying the minimum price of \$12 per barrel, these shipments represented sales aggregating at least \$1,062,000; and further, we know that a beer broker by the name of William V. Loughran, of Scranton, Pennsylvania, often during the taxable year sent envelopes which at times were known to contain money, to the petitioner's office in Pittston. The messenger was told to deliver them to McHugh, but on one occasion they were accepted by Tom Kehoe, the petitioner's brother.

These and other facts previously stated in our findings lead us to the conclusion that large amounts of income were received in cash by or for the petitioner from the operation of the brewery in 1925, and that the receipt of this income has never been reported nor disclosed by him. To hold otherwise would be to ignore the obvious. He not only failed to disclose and report in his return the income from the operation of the brewery, but has at all times denied and still denies any connection whatever with its operation. We accordingly hold that the return of petitioner John Kehoe for 1925, was false and fraudulent with intent to evade tax and that under the provisions of section 278 (a), supra, the tax may be assessed at any time.



We further hold that the facts disclosed definitely show fraud, malfeasance, and misrepresentation of facts materially affecting the determination and assessment of the tax covered by the final closing agreement and that the respondent, acting with the approval of the Secretary of the Treasury, was justified in going behind the said closing agreement in making the determination which forms the basis of this proceeding. *Holmes & Jones*,

51 *Inc.*, 30 B. T. A. 74. We have found that the petitioner with intent to evade tax, failed to report in his return income received from the operation of the brewery and on the record it is apparent that he made no disclosure of such income at the time of executing the closing agreement, nor at any other time. While the filing of a return and the signing of a closing agreement are separate and distinct and fraud in one does not necessarily indicate fraud in the other, the same or a continuing act, that of wilfully concealing income, may be, and on the facts in this case, is a sufficient basis for finding that the return was fraudulent with intent to evade tax and further that there was a misrepresentation of a material fact in the execution of the closing agreement. Cf. *Thomas J. Ingram*, 32 B. T. A. 1063 and *Ethel H. Hoge et al., Executors*, 33, B. T. A. 718.

The petitioner contends that the respondent has not only the burden of proving fraud in order to overcome the defense that the period within which the tax may be assessed has expired, but also has the burden of proving the amount of the tax. Or in other words, it is the petitioner's contention that in cases where the respondent charges fraud and the burden of showing fraud is placed upon him by the statute, his determination of a deficiency is not prima facie correct, as in cases where fraud is not involved. In support of this contention the petitioner relies upon *Taplin v. Commissioner*, 41 Fed. (2d) 454; *Budd v. Commissioner*, 43 Fed. (2d) 509; and *Central Union Trust Co., of New York, Executor*, 25 B. T. A. 757. These cases are not in point. In the first case cited, it does not appear that fraud was pleaded and the court held that the petitioner had presented plausible testimony showing error in the determination of the deficiency and that this testimony had not been contradicted except by inference. In the two remaining cases the respondent failed to sustain the burden of proving fraud and there was no occasion to consider and determine the question here raised by the petitioner. In this case the respondent has sustained that burden. While it is usually true that in order to show that a return is false and fraudulent with intent to evade tax, it is necessary to prove the receipt of income not reported by the taxpayer in such return, but once it is shown that the return is false and fraudulent, the burden of proving the respondent erred in determining the deficiency is on the petitioner.



The issues are clearly separate. *L. Schepp Co.*, 25 B. T. A. 419, 436. Here the petitioner introduced no evidence to show that the amount of the deficiency as determined by the respondent is erroneous, but elected to stand on the fraud issue alone. Having resolved the fraud issue against the petitioner, the respondent is affirmed on this issue.

Furthermore, we are of the opinion that even if the rule were as contended for by the petitioner, the determination of the respondent should be sustained. The evidence clearly indicates gross receipts from the operation of the brewery in an amount much greater than the amount upon which the computation of the deficiency here under consideration was based, and we do not understand that the respondent, even under petitioner's theory, should also be required to prove his deductions for him.

We have found as a fact that the deficiency herein was due to fraud with intent to evade tax, and on that finding the  
53 penalty determined by the respondent attaches as provided by statute. Sec. 275 (b), Revenue Act of 1926.

The final issue relates to the liability of Sarah Kehoe. No proof was offered by either party and this issue was submitted on a motion for a finding of no deficiency, the basis for the motion being the admissions contained in respondent's answer.

The notice of determination of deficiency was addressed to "Mr. and Mrs. John Kehoe." The petition herein is a joint petition and designates John Kehoe and Mrs. John Kehoe as the petitioners. It was signed and verified by each of them. In paragraph 1 thereof the petitioners describe themselves as individuals, husband and wife, residing at 143 William Street, Pittston, Pennsylvania, and state that they filed a joint return of their income for the year 1925. In paragraph 5 (a) of the petition, which contains the allegations of fact as to the return, it is alleged that on or about March 15, 1926, the petitioners, being husband and wife, duly filed a joint return of their income on form 1040, provided therefor by the Bureau of Internal Revenue. They also plead the statute of limitations and the execution of a final closing agreement. The respondent, in paragraph 1 of his answer, admits that the petitioners are individuals, residing at 143 William Street, Pittston, Pennsylvania, and that they are husband and wife, but in paragraph 5 denies that they filed a joint return of their income, and in connection with this denial, alleges that on March 15, 1926, petitioner John Kehoe filed an income tax return, whereon he answered in the affirmative the question, "Is this a joint return of husband and wife?" and alleges  
54 further that the said return was executed and signed by John Kehoe and by no other person. Further, in the answer, after admitting that none of the income in-



volved in this proceeding was income to Sarah Kehoe, and that she was guilty of no fraud, malfeasance, or misrepresentation of a material fact in connection with the closing agreement, the respondent concludes with a prayer for a determination that the final closing agreement was induced by the fraud and deceit of John Kehoe, that the return of John Kehoe was false and fraudulent, and that the assessment of the tax against him might be made at any time. The answer asks for no determination as to Sarah Kehoe.

In their reply the petitioners admit the respondent's allegation that John Kehoe filed an income tax return for the calendar year 1925, whereon he answered in the affirmative the question, "Is this a joint return of husband and wife?" and further admit that the said return was executed by John Kehoe and no other person.

Although the nature of the return filed by John Kehoe was put in issue by the respondent's denial that it was a joint return, no proof was submitted, by either party, other than the return itself, and it disclosed nothing that was not already covered by the pleadings. Obviously the pleadings do not show that the said return was or was not the joint return of the petitioners.

On this state of the record petitioner Sarah Kehoe asks for a finding of no deficiency, while the respondent argues for a determination of the full deficiency and penalty against her, and as a basis for this argument assumes the filing of a joint return

by the petitioners. John Kehoe and Sarah Kehoe, contending on this assumption that there is joint and several liability. Regardless of whether there is joint and several liability where a joint return by husband and wife is filed and a determination based on such a return is made, the respondent by his answer has precluded such an argument in this case. The assumption of a joint return is directly contrary to the allegations contained in the answer, which has not been amended and with reference to which no request to amend has been made.

It thus appears that the respondent has not proved the filing of a false or fraudulent return except in the case of a return which he alleges was executed and signed by John Kehoe alone and which he denies was a joint return. The record does not show the filing of a false or fraudulent return by or for the petitioner, Sarah Kehoe. On these facts, supplemented by the admission that none of the income herein involved was the income of Sarah Kehoe and the further fact that she was guilty of no fraud or malfeasance in connection with the closing agreement signed by her, her claim of no deficiency is sustained.



As to the petitioner, John Kehoe, decision will be entered for the respondent.

As to the petitioner, Sarah Kehoe, decision will be entered for the petitioner.

(Seal.)

56

Before United States Board of Tax Appeals

*Decision.*

Filed March 12, 1936

Pursuant to the determination of the Board, as set forth in its report promulgated March 10, 1936, it is

Ordered and decided: That as to the petitioner John Kehoe, there is a deficiency of \$208,043.36, plus a penalty of \$108,803.61, for the year 1925. And it is further

Ordered and decided: That as to the petitioner Sarah Kehoe, there is no deficiency and no penalty for the year 1925.

[SEAL]

(Signed) BOLON B. TURNER,

*Member.*

Entered Mar. 12, 1936.

57

In United States Circuit Court of Appeals, Third Circuit

*Petition for review*

Filed June 12, 1936

*To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:*

Now comes the petitioner, John Kehoe, by his attorneys, Leo W. White, William H. Gillespie, and R. M. O'Hara, and respectfully shows as follows:

I

*Jurisdiction*

(a) The petitioner on review, John Kehoe, is an individual residing at Pittston, Luzerne County, Pennsylvania. The petition before the Board of Tax Appeals was brought by him in his individual capacity. His income tax return for the calendar year 1925 was filed with the Collector of Internal Revenue for the Twelfth District of Pennsylvania, at Scranton, Pennsylvania, and the residence of said petitioner and the office of the said Collector are located within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.



(b) The respondent, Guy T. Helvering, is the duly appointed, qualified and acting Commissioner of Internal Revenue, holding office by virtue of the laws of the United States.

58 (c) The Commissioner of Internal Revenue determined a deficiency in income tax for the calendar year 1925 against petitioner on review and his wife, Sarah Kehoe, in the amount of \$208,043.36, and a fraud penalty thereon in the amount of \$108,803.61. A petition was duly filed with the United States Board of Tax Appeals, and the case was tried and submitted to the said Board for its decision on August 20, 21, 22, 23, 24 and 27, 1934. On March 10, 1936, the Board promulgated its Opinion, 34 B. T. A. — (No. 9), and on March 12, 1936, the Board entered its decision in accordance with its Opinion, wherein it ordered and decided that as to petitioner Sarah Kehoe there was no deficiency and no penalty for the year 1925, and as to petitioner John Kehoe there was a deficiency of \$208,043.36 plus a penalty of \$108,803.61 for the year 1925.

(d) This petition is filed in pursuance of the provisions of sections 1001 and 1002 of the Revenue Act of 1926 as amended, for the review of the decision of the United States Board of Tax Appeals rendered herein.

## II

### *Nature of controversy*

The nature of the controversy is as follows, to wit:

The questions presented are,

First, whether the 1925 return of petitioner was false and fraudulent and filed with intent to evade taxes; and

59 Second, whether there was justification for setting aside a closing agreement entered into with respect to petitioner's tax liability for 1925, under the provisions of section 1106 of the Revenue Act of 1926; and

Third, whether petitioner was entitled to a further hearing on the question of the amount of tax liability, if any, following the Board's finding that petitioner's return for 1925 was false and fraudulent and approving the action of the respondent in setting aside the closing agreement.

A. On March 15, 1926, petitioner filed an income tax return covering the calendar year 1925. The answer to the question as to whether or not it was a joint return of husband and wife was in the affirmative, but said return was signed and verified only by John Kehoe, petitioner on review. In said return there was shown a total taxable income of \$19,198.33, and a tax of \$194.56, which was duly paid by petitioner.



B. Thereafter, and in November 1927, following an examination of the said 1925 return, there was assessed against petitioner an additional tax for 1925 of \$9,563.86, plus interest of \$873.32, and said additional tax and interest was on November 15, 1927, duly paid to the Collector of Internal Revenue. In arriving at said deficiency respondent increased net taxable income for 1925 from \$19,198.33 as shown in the return, to \$73,188.79, an increase of \$53,990.46. Following the assessment and payment of said additional tax in November 1927 an agreement in writing was entered into between petitioner and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury,

60 pursuant to the provisions of section 1106, (b) of the Revenue Act of 1926, whereby it was mutually agreed that the total tax liability for tax, interest, and penalty due the United States for the year 1925 was \$10,631.74, representing the tax upon the original return of \$194.56 and the additional tax and interest assessed and paid by petitioner in November 1927. Said agreement was executed by petitioner on December 27, 1927, and by D. H. Blair, Commissioner of Internal Revenue, on January 25, 1928, and was approved by Henry Herrick Bond, Acting Secretary of the Treasury on January 27, 1928.

C. The three-year period for assessment of any additional tax under the 1925 return of the petitioner expired, under pertinent provisions of the Statute, on March 15, 1929.

D. On February 24, 1932, respondent mailed to petitioner and his wife a notice of deficiency which showed on its face a taxable net income of \$909,198.33, a deficiency in tax for 1925 of \$208,043.36, and a fifty percent penalty of \$108,803.61. The increase in income in that deficiency notice over the taxable income reported on the original return was \$890,000.00, alleged to be net income from the operation of a brewery known as the P. F. McGowan Brewery. Said increase of \$890,000.00 as shown in the deficiency notice was inclusive of the increase in income of \$53,990.46 resulting in the additional assessment of 1927, which was the subject matter of the closing agreement.

E. A petition was duly filed with the Board of Tax Appeals, as were also an answer thereto by respondent and a reply by petitioner and his wife. The case was heard before a division of the Board of Tax Appeals sitting at Scranton, Pennsylvania, on August 20, 21, 22, 23, 24, and 27, 1934. At the said hearing before the Board of Tax Appeals petitioner by his counsel moved that at the trial of the proceeding the issues be limited to—

61 First, whether or not the return of petitioner for 1925 was false or fraudulent, with intent to evade tax, thereby taking the



case outside the Statute and permitting the determination and assessment of an additional tax; and

Second, whether or not there was fraud or malfeasance or misrepresentation of fact materially affecting the subject matter of the closing agreement, thereby justifying the setting aside of the closing agreement.

The motion was denied by the Board.

F. The respondent presented evidence in an attempt to show that the 1925 return of petitioner was false and fraudulent and to show further that there was fraud, malfeasance, or misrepresentation of fact materially affecting the subject matter of the closing agreement. Petitioner presented no oral evidence, resting his case upon the absence of fraud in connection with the return, and upon the absence of fraud, malfeasance, or misrepresentation of fact in connection with the closing agreement. At the conclusion of the testimony petitioner moved that, if and when the Board should affirm the setting aside of the closing agreement, he then have the right to a further hearing at which he might present evidence on the measure of the tax liability, if any. This motion was denied by the Board.

G. In the Board's Opinion promulgated March 10, 1936, it was held that the return of petitioner for 1925 was false and  
62 fraudulent with intent to evade tax and that under the provisions of section 278 (a) of the Revenue Act of 1926 the tax might be assessed against him at any time. It further held that there was fraud, malfeasance, and misrepresentation of fact materially affecting the determination and assessment of the tax covered by the closing agreement, and that the respondent, acting with the approval of the Secretary of the Treasury, was justified in going behind the said closing agreement and making the determination which formed the basis of this proceeding.

### III

#### *Assignments of error*

Petitioner's assignments of error are as follows:

1. The Board erred in denying petitioner's motion that on the trial of the case on August 20 to 27, inclusive, in 1934, the issues be limited to the questions of whether the return of petitioner for 1925 was false or fraudulent with intent to evade tax, and whether or not there was fraud or malfeasance or misrepresentation of fact materially affecting the subject matter of the closing agreement entered into in January 1928.

2. The Board erred in denying petitioner's motion at the trial of the case in August 1934, that petitioner might have the right



to a further hearing to present evidence as to the measure of the tax liability, if any, after the Board had decided that the closing agreement might be set aside.

63 3. The Board erred in admitting in evidence over petitioner's objection at the trial an alleged indemnity agreement purporting to bear the signature of petitioner, said agreement being admitted as respondent's exhibit VV.

4. The Board erred in admitting in evidence over petitioner's objection at the trial, memoranda alleged to be in the handwriting of one Harry Kenny, witness for respondent. Said memoranda were admitted as respondent's exhibits WW and XX.

5. The Board erred in admitting in evidence over petitioner's objection at the trial, a conversation alleged to have been held in petitioner's presence and hearing between William M. Mul-laghy, a witness for respondent, and one Evan Jones, which it was alleged took place in said Jones' office in Wilkes-Barre, Pennsylvania.

6. The Board erred in finding that one of petitioner's business activities in 1925 was that of manufacturing and selling beer.

7. The Board erred in finding that Patrick F. McGowan, the permittee for the P. F. McGowan Brewery (or Bartels Brewery) was employed by petitioner to make application for and procure such permit.

8. The Board erred in finding that a bank account of \$6,000.00 at the Peoples National Bank of Edwarsville, Pennsylvania, was opened, or any portion thereof was disbursed, on the instructions of or at the direction of petitioner.

9. The Board erred in finding that petitioner made one William F. McHugh his agent to give instructions to the said McGowan concerning the operation of said brewery.

64 10. The Board erred in finding that said P. F. McGowan in signing the lease on said brewery for the ten months period from March 1, 1924, to December 31, 1924, was acting under petitioner's instructions.

11. The Board erred in finding that the notice to renew said lease to said brewery, and the supplemental lease on said brewery, were signed by the said McGowan pursuant to employment by petitioner.

12. The Board erred in finding that the said McGowan in subscribing and swearing to an application for a permit to said brewery on February 9, 1924, was acting under the instructions of petitioner.

13. The Board erred in finding that, in connection with the said application for permit on February 9, 1924, an indemnity agreement was entered into for the protection of the surety com-



pany by petitioner and his brother, Thomas Kehoe, as indemnitors.

14. The Board erred in finding that petitioner commenced the manufacture of beer on said brewery premises on March 1, 1924.

15. The Board erred in finding that so-called "High-Powered" beer was manufactured and shipped by rail from the said brewery.

16. The Board erred in finding that in the latter part of 1924, prohibition agents confiscated four cars of beer from the said brewery.

17. The Board erred in finding that McGowan in applying for a renewal of the brewery permit for 1925 on July 28, 1924, was acting on instructions from petitioner.

65 18. The Board erred in holding that any indemnity agreement continued in force in connection with a renewal permit issued July 24, 1925, had been executed by petitioner and his brother, Thomas Kehoe.

19. The Board erred in finding that McGowan in executing an application on December 28, 1925, for a renewal of the brewery permit for 1926 was acting at the direction of petitioner.

20. The Board erred in finding that the said McGowan was employed and used by petitioner to act as lessee of the brewery and apply for and hold permits for the operation thereof, and that petitioner was the real party in interest.

21. The Board erred in finding that petitioner often conferred in his office at Pittston with McGowan and McHugh in connection with the operation of said brewery.

22. The Board erred in finding that petitioner instructed McGowan to keep his mouth shut and to talk to no one about the brewery.

23. The Board erred in finding that petitioner sent the said McGowan on trips to New York, Philadelphia, and Atlantic City or elsewhere to get him away from the brewery, and that petitioner furnished the money for McGowan's expenses on such trips.

24. The Board erred in finding that petitioner paid McGowan a salary or bonuses or additional sums of any nature in connection with the operation of said brewery.

66 25. The Board erred in finding that petitioner caused an automobile to be purchased for said McGowan or caused any sums of money to be paid to said McGowan on account of the purchase of said automobile.

26. The Board erred in finding that the said brewery was being operated by petitioner under the McGowan lease.



27. The Board erred in finding that 885 cars of cereal beverage shipped by rail from Kingston, Pennsylvania, in 1925 were loaded at the said brewery siding at Edwardsville, Pennsylvania.

28. The Board erred in failing to find as a fact that the assessment of \$9,563.86 in the year 1927, which with interest thereon plus the tax paid on the original return was the subject matter of the closing agreement was predicated on an additional income of \$53,990.46.

29. The Board erred in failing to find as a fact that respondent presented no evidence to show the source of said additional income of \$53,990.46.

30. The Board erred in failing to find as a fact that respondent presented no evidence to show that said additional income of \$53,990.46 was derived from a source other than from the operation of said brewery.

31. The Board erred in failing to find as a fact that in the deficiency notice from which the appeal was taken on this case, the respondent considered the said additional income of \$53,990.46 as income from the operation of the said P. F. McGowan Brewery.

32. The Board erred in failing to find that the net income, if any, derived by petitioner from the operation of the said 67. brewery was discovered by, and the amount thereof was known to, respondent before the execution of the closing agreement.

33. The Board erred as a matter of law in finding that respondent had sustained his burden of proving that the 1925 return of petitioner was false or fraudulent with intent to evade tax.

34. The Board erred as a matter of law in finding that respondent has sustained his burden of proving that petitioner was guilty of fraud or malfeasance or misrepresentation of fact materially affecting the subject matter of the closing agreement.

35. The Board erred as a matter of law in determining what constitutes fraud or malfeasance and/or misrepresentation of fact which would justify the setting aside of a closing agreement.

36. The Board erred in finding that respondent, with the approval of the Secretary of the Treasury, was justified in going behind the said closing agreement and in determining the deficiency in taxes and penalty which forms the basis of this proceeding.

37. The Board erred in holding and deciding that petitioner was liable for an additional tax for 1925 in the amount of \$208,043.36 and a fraud penalty in the amount of \$108,803.61.

38. The Board erred in failing to hold and decide that there was no deficiency in tax and penalty due from petitioner for the year 1925.



Wherefore, petitioner asks that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Third Circuit; that a transcript of the record be prepared in accordance with the law and with the rules of said Court and be transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

LEO W. WHITE,

*Dime Bank and Trust Building, Pittston, Pennsylvania,*

WM. H. GILLESPIE,

*Dime Bank and Trust Building, Pittston, Pennsylvania,*

R. M. O'HARA,

*1044 Shoreham Building, Washington, D. C.,*

*Counsel for Petitioner.*

[Duly sworn to by John Kehoe; jurat omitted in printing.]

69 In United States Circuit Court of Appeals

*Notice of filing petition for review*

Filed Jan. 12, 1936.

To:

GUY T. HELVERING,

*Commissioner of Internal Revenue,*

*Washington, D. C.*

HERMAN OLIPHANT,

*General Counsel for the Department*

*of the Treasury, Washington, D. C.*

You are hereby notified that John Kehoe did, on the twelfth day of June 1936, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this twelfth day of June 1936.

LEO W. WHITE,

*Dime Bank and Trust Building, Pittston, Pennsylvania,*

WM. H. GILLESPIE,

*Dime Bank and Trust Building, Pittston, Pennsylvania,*

R. M. O'HARA,

*1044 Shoreham Building, Washington, D. C.,*

*Counsel for Petitioner.*



70 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this twelfth day of June 1936.

GUY T. HELVERING,  
*Commissioner of Internal Revenue,  
Respondent on Review.*

HERMAN OLIPHANT,  
*General Counsel for the Department of the Treasury,  
Washington, D. C.,  
Counsel for Respondent.*

In United States Circuit Court of Appeals

*Order re settling Statement of Evidence*

Filed March 1, 1938

John Kehoe, petitioner on review herein, having filed a motion that in settling the Statement of Evidence for inclusion in the record on review in this case the Board of Tax Appeals need not require the Statement of Evidence to be wholly in narrative form, but may include as a part of said Statement of Evidence such portions of the testimony before the Board as the parties may agree upon, or as the Board may deem necessary, and consideration having been given to said motion, it is by the Court this 25th day of February 1938:

71 Ordered that in settling the Statement of Evidence for inclusion in the record on review in this case the United States Board of Tax Appeals need not require the Statement of Evidence to be wholly in narrative form, but may include as a part of such Statement of Evidence in question and answer form such portion or portions of the testimony given before the Board as the parties may agree upon, or as the Board may deem necessary.

It is further ordered that the Clerk of this Court be and he is hereby directed to transmit a certified copy of this Order to the Clerk of the United States Board of Tax Appeals.

J. W. THOMPSON,  
*Judge.*



[Clerk's certificate to foregoing paper omitted in printing.]

72 In United States Circuit Court of Appeals

*Order and consent as to exhibits*

Filed July 18, 1938

Upon the annexed consent of Leo W. White, attorney for petitioner, and John P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, attorney for the respondent, it is

Ordered, that the original exhibits numbered Petitioner's Exhibits 1 and 2; The Respondent's Exhibits A to Z, inclusive, Except X; AA to LL, inclusive; UU to XX, inclusive; ZZ; AAA to OOO, inclusive; RRR, SSS and TTT; and BBBB, CCCC, and DDDD; now on file with the Clerk of the United States Board of Tax Appeals and heretofore introduced and received in evidence before the Board in the above-entitled proceeding, be transmitted physically by said Clerk of the

73 Board of Tax Appeals, to this Court and filed with the Clerk herein and that such exhibits shall be treated as physical exhibits and form part of the record on petition for review herein and may be physically presented and submitted to this Court for consideration by the Court upon the argument of this Cause and it is

Ordered, that the exhibits may remain in the custody of the Clerk of the Board of Tax Appeals until a time not later than fifteen days prior to the argument of this cause; and it is further

Ordered, that the Clerk of the Board of Tax Appeals be and he hereby is directed to make such transmission of said exhibits upon the inclusion of a request therefore in the praecipe filed by either party with the Board of Tax Appeals and that such original exhibits be made part of the record on petition for review in the above-entitled proceeding to be transmitted to this Court.

By the Court,

MARIS, Judge.

Dated at Philadelphia, Pennsylvania, July 15, 1938.

The undersigned hereby consent to the entry of the foregoing order without notice to either party.

[SEAL]

(s) LEO W. WHITE,  
Pittston, Pennsylvania.

(s) J. P. WENCHEL,

Chief Counsel,  
Bureau of Internal Revenue,  
Attorney for Respondent.

74 [Clerk's certificate to foregoing paper omitted in printing.]



JOHN KEHOE, PETITIONER.

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 64603

*Statement of evidence*

OFFICIAL REPORT OF PROCEEDINGS

REPORTER'S MINUTES

Hearing at Scranton, Pennsylvania, on the 20th day of August 1934, at 10 o'clock A. M.

The above-entitled cause came on for hearing on this the 20th day of August 1934, before Honorable Bolan B. Turner, Member of the United States Board of Tax Appeals, at Scranton, Pennsylvania, pursuant to notice of hearing heretofore given, whereupon the following proceedings were had and testimony heard to-wit:

*Appearances*

R. M. O'Hara, Esq. (Washington, D. C.), Leo W. White, Esq., and W. H. Gillespie, Esq. (Pittston, Pennsylvania), on behalf of the Petitioners.

M. B. Leming, Esq., and H. E. Lucas, Esq. (Robert H. Jackson, Esq., General Counsel, Bureau of Internal Revenue) on behalf of the Commissioner of Internal Revenue, Respondent.

*Statement of case for petitioner*

MR. O'HARA. YOUR HONOR, this case involves a deficiency for the year 1925, and the respondent has also proposed a 50 per cent penalty. It presents some peculiar aspects, by reason of which we expect to make certain motions with respect to procedure to be followed, but, first, I think we should inform your Honor briefly the nature of the case and the issues.

This is unlike the ordinary case where under Rule 30 of the Board's rules the petitioner has the burden with respect to all issues.

In this case the petitioners filed a timely return for 1925 with the result that the statute of limitations as to any additional tax expired not later than March 15, 1929.



Before the expiration of the statute, and about the month of September 1927, an examination by the agent of the Commissioner was made of the books and records and affairs of these petitioners. A recommendation was made that additional tax be assessed for 1925. The petitioners executed a waiver of right to go to the Board, and the tax was assessed and paid by the petitioners, and thereafter an agreement as to the final determination was entered into. That was executed by the petitioners in December 1927, and by the Commissioner and Assistant Secretary of the Treasury in January 1928.

We have a situation here where the statute of limitations has run since the deficiency letter was not mailed until about the month of February 1932, the statute having run in 1929.

So, we have this situation, no tax can be assessed or collected unless certain exceptions are present.

In this case they charge the return was false and fraudulent in the first place, and in the second place this closing agreement depriving them of the right to reopen this case—that there was fraud in connection with that closing agreement.

For those reasons we expect to make certain motions with respect to procedure.

#### *Motions*

Mr. O'HARA. Your Honor, we move in respect to the procedure to be followed, that the Board now direct that in this hearing, the issues be limited, and that they be limited to the two questions as to which the Commissioner has the burden of proof, namely, the question of whether or not there was fraud, malfeasance, or misrepresentation in connection with the closing agreement, and secondly, whether or not the return was false and fraudulent, thereby setting aside the statute of limitations.

The MEMBER. What difference is there between this motion and the one filed by the petitioner under date of April 10th, to limit the issues in this proceedings?

78 Mr. O'HARA. There is this, at the time of filing of that motion, your Honor, we based our motion purely on a matter of convenience. We did not point out to the Board the fact that under the law, looking to the wording of section 1106 (b), that the Board could not and should not compel the reopening and introduction of testimony looking to the measure of tax. I feel that if at that time we had pointed it out, the action on that motion might have been different.

The MEMBER. In other words, the same motion, but other reasons stated?

Mr. O'HARA. We are looking to the law rather than convenience. We base that upon the fact that until there has been



such a finding, we should not be compelled to put in evidence as to what, if any, income there was.

The MEMBER. You desire to limit this proceeding here to the proposition of whether or not the closing agreement should be properly set aside?

Mr. O'HARA. Yes, your Honor, and the statute of limitations, which goes to the question of fraud in the return itself.

The MEMBERS. Are those two matters admitted in the pleading?

Mr. O'HARA. The pleadings admit the closing agreement, and the pleadings on their face shows the expiration of the statute of limitations.

The MEMBER. It seems to me that we can proceed with the hearing of the entire case at this time, and I can not see that the petitioner will be prejudiced, and the Board can take all of the things under consideration, and dispose of them at one time without the necessity and the trouble and the expense of a further hearing, and on that basis the motion will be denied.

79 Mr. O'HARA. The record may show an exception.

The MEMBER. The exception will be noted.

Mr. O'HARA. The next, your Honor, the petitioner moves that the Board at this time, as a matter of procedure, rule that the respondent has the burden, not only of showing fraud or malfeasance, or misrepresentation in connection with the agreement, and in showing that the return was false and fraudulent, but also in showing the receipt of income.

The MEMBER. It seems to me that the statute and the rules of the Board cover this. The burden of showing fraud as a reason for setting aside the closing agreement, and the going behind the statute of limitations would be on the respondent, and it is up to him to make his case, and likewise it is up to the petitioner. The motion will be denied.

Mr. O'HARA. The record may show an exception.

The MEMBER. Exception will be noted.

Mr. O'HARA. Your Honor, the next motion is that the respondent proceed with the introduction of testimony, since he has the burden of showing fraud in connection with the closing agreement, and the tolling of the statute.

The MEMBER. Do you wish to say anything, Mr. Leming?

Mr. LEMING. I was going to say this, your Honor, that we shall be glad to abide by whatever your Honor may direct in this connection.

The MEMBER. As I stated, since this is a case of going behind the closing agreement, it seems to me that the burden of proceeding would fall on the respondent.

80 Mr. LEMING. I will call Mr. Pat McGowan first. Before we call the first witness I should like to inform your Honor something about the proof.



*Statement of case for respondent*

Mr. LEMING. If your Honor please, the proof we expect to offer has sundry ramifications and we will have to ask your Honor's indulgence for a more or less tedious session, and I think that the evidence may be understood better if we outline at the beginning where we think we are going.

The taxpayer filed a return for the year 1925 which he designated as a joint return of husband and wife, and that return was filed within the time required by the statute for filing returns for that year. The return itself reported a tax liability of \$194.56, which the taxpayer paid.

In August 1927 a revenue agent made a report with respect to that return, and recommended the assessment of an additional tax of \$9,563.86, for the year 1925. The taxpayer consented to the assessment of that additional amount of tax, and at the time the revenue agent brought his recommendation to the petitioner's attention, the petitioner signed such a consent and waiver of a right to appeal to this Board. Thereupon that tax was assessed, and it was paid by the petitioner.

Shortly after the assessment of that tax, and in November 1927 the petitioner made application to the Commissioner for the making of what is known as a closing agreement.

Thereafter, in December 1927 the petitioner signed a closing agreement. That closing agreement, so signed by him, was 81 signed by the Commissioner in the early part of January 1928 and was approved by the Secretary of the Treasury in the same month, that is, January 1928.

Now, in the ordinary situation that would have been the final word to this petitioner's liability for the year 1925.

The matter stood in that situation until in the month of January 1929, when certain persons came to the office of the Commissioner of Internal Revenue voluntarily, and made certain disclosures with respect to this petitioner's business and income for the year 1925. The information furnished by these persons at that time, June 1929, was referred to a special agent of the Intelligence Unit of the Bureau, and, when I mentioned the Commissioner's office, where these voluntary disclosures were made, I mean in the office of the Chief of the Intelligence Unit, which is part of the Commissioner's office.

The matters referred to by these persons, as I say, was referred to a special agent for an investigation, first, to determine if there was sufficient basis for reopening this petitioner's tax liability for the year 1925.

As a result of his determination, it was recommended that the case be reopened. So, on January 3, 1930, the Commissioner ad-



dressed a letter to the petitioner so advising him, and that letter was delivered to Mr. Kehoe, the petitioner, by a special agent of the Bureau of Internal Revenue.

Now, at about that same date, or a few days prior, that is on or about January 3, 1930, one Mr. Pilliod, an attorney of Cleveland, Ohio, volunteered this information to a special agent of the Bureau of Internal Revenue, to-wit, that he had a client, one William V. Loughran, who desired to inform the Bureau of Internal Revenue of certain transactions, and certain business relations his client had had with Mr. John Kehoe, the petitioner, in the year 1925.

An arrangement was made through Mr. Pilliod, attorney for Mr. Loughran, that he should have an opportunity to make any statement which he wishes to make.

Then a special agent was sent to Cleveland, Ohio, and then on the 25th day of February, 1930, in the presence of Mr. Pilliod, and I believe some other persons whose names I do not recall at the moment, Mr. Loughran made a statement, which was to this effect, that in the year 1925, rather he said the years 1924, 1925, and 1926, he had paid to John Kehoe, the petitioner in this proceeding, not less than \$2,000,000 for the purchase of beer manufactured at Bartels Brewery, of Edwardsville, Pennsylvania.

Now, Mr. Loughran at that time had entered a plea of guilty to a conspiracy indictment in the United States District Court at Cleveland. My recollection is not clear at the moment whether the statement was made prior to his being sentenced or after. I believe his first statement on February 25, 1930, was immediately prior to his entering a plea of guilty in that conspiracy case.

Now, Mr. Loughran, in order that he might be corroborated informed the agent that, if he would go to the Anthracite Trust Company of Scranton, Pennsylvania, he would there find a record of the drafts that he had purchased to pay this petitioner for the beer he had purchased from the Bartels Brewery. He gave this special agent a letter addressed to an officer of the Anthracite Trust Company at Scranton.

Mr. Loughran maintained several accounts at the Anthracite Trust Company, one under his own name as William V. Loughran, another under an alias, William J. Vincent, another under an assumed name of Frank R. O'Hare.

The special agent went to that Trust Company, and he found cancelled drafts charged to those accounts of a little over a million dollars in the years 1924, 1925, and 1926. Those drafts, with very minor exceptions, were payable to cash, and with one exception were New York drafts. They were cashed at the Miners Savings Bank in Pittston, Pennsylvania, and the money was repaid over the window of that bank without requiring any en-



dorsement on the drafts. The drafts, therefore, on their face, with one or two exceptions, or a draft payable to cash, they bear the stamp of the Miners Bank, Pittston, showing cash was paid on them.

It is not clear whether the cash was paid out at the window, or whether the amounts were credited to some one account.

Now, Mr. Loughran informed the special agent that in addition to the drafts he had purchased at the Anthracite Trust Company, he had delivered large sums of cash either in person or by messenger to the petitioner for the purchase of beer manufactured at the Bartels Brewery.

Now, going a moment to the brewery itself, that was quite a large brewery at Edwardsville, Pennsylvania, which was owned by a corporation known, I believe, as the Bartels Brewing Corporation or company. It had been manufacturing cereal beverage; and in the latter part of 1923, the petitioner, John Kehoe, entered into negotiations to lease the brewery. His negotiations terminated in a lease being executed on February 1, 1924. He caused the lease to be taken in the name of one Patrick F. McGowan.

Patrick F. McGowan was a baseball player, or rather I believe he was the secretary of a baseball club in the year 1923, and was a man without means. He received a salary as the secretary of the baseball club, but he was without property or other financial resources.

He agreed with Mr. Kehoe that for a salary for \$150 a month, commencing February 1, 1924, Mr. Kehoe could use his name as the ostensible lessee of that brewery, and that he could thereafter operate it in the name of Patrick F. McGowan.

It was operated from that time, and throughout the year 1924, as McGowan's Brewery.

McGowan agreed for the same consideration, that in his monthly salary, that a permit could be obtained from the Federal Government for the operation of that brewery in the name of Patrick F. McGowan. The permit was so obtained. In the obtaining of that permit, the petitioner, Mr. Kehoe, engaged one George F. Buss to make a trip to Washington to expedite the issuance of that permit.

Subsequently, Mr. Buss receipted the prohibition administrator at Philadelphia for the permit, and took it to Pittston, Pennsylvania, where it was delivered eventually to Patrick F. McGowan, the ostensible permittee.

The indemnity bond which was required for the issuance of that permit, and which was made by the American Surety Company, was signed by the petitioner, and by his brother, Thomas Kehoe.



85 Subsequently, that same permit was renewed under the same circumstances except, they did not, as I recall, send Mr. Buss to Washington in connection with its renewal.

At the end of 1925 when an application had been made for a further renewal of the permit, the Federal Government required an increase in the bond from \$10,000 to \$25,000. The American Surety Company became the indemnitor on that bond, and there was put up with the American Surety Company a certificate of deposit obtained at the Miners Savings Bank, at Pittston, Pennsylvania, on December 29, 1925, in the sum of \$25,000 cash. That certificate of deposit, number 696, is still on file and held by the American Surety Company. That \$25,000 covered by that certificate of deposit was based upon a note signed at the Miners Savings Bank at Pittston, Pennsylvania, by John Kehoe, the petitioner, and his brother, Thomas Kehoe.

The brewery had another employee, one William F. McHugh, who was the manager on the ground of the brewery in its operation.

At the time of the obtaining of the lease from the Bartels Brewery Company, which was signed on behalf of the Brewery Company by one F. L. Schott, John Kehoe, the petitioner, handed to Mr. McGowan and Mr. McHugh, they were together, and when this occurred, I don't remember, but the two were together, and John Kehoe, the petitioner, handed the money I believe first to McHugh, \$6,000 in cash. That was in the latter part of February 1924—to be deposited in the name of Patrick F. McGowan at the Peoples National Bank, of Edwardsville, Pennsylvania, out of which was to be paid to F. L. Schott, the representative of the brewery, the first month's payment of \$3,000, and for 86 certain supplies there at the brewery, and for some other expenses which will appear.

At that time the rental was always paid in cash. I believe it was later raised to some point higher than \$3,000 a month.

The account in the Peoples National Bank was opened on March 1, 1924.

Now, one of the first customers we find at the brewery was one Harry Kinney, who will testify to having purchased several car-loads of beer manufactured at that brewery, and to having paid the petitioner himself for the beer so purchased.

It will appear from the evidence that there were two kinds of beer manufactured by the petitioner at the brewery, one which was an inexpensive beer, and the other was an expensive beer. The expensive beer was sold at prices from \$15 to, I do not remember whether barrels—I do not remember whether barrels or half barrels—up.



The only records kept at the brewery of which we have knowledge at this time by the actual record itself, is that one which related to the inexpensive beer.

Now, the record as to the inexpensive beer, or we might call it the cheap beer, will appear that it was padded, because one inspecting the brewery would see a greater number of beer barrels, and unless there was a production, so many barrels being present, there would not be a very good explanation, reconciling them with the actual production of cheap beer. So, the record which is here will show an actual production of cheap beer, of about four times the actual production.

87 Now, along in the end of 1924, the Federal prohibition agent had seized several cars of beer in the yards adjacent to the brewery, and, as a result of that seizure, there was held as what was known as a revocation proceeding to determine if the permit should be revoked, and to determine if a then pending application for a renewal of the permit for the year 1925 should be denied.

The petitioner, Mr. Kehoe, took charge of the preliminaries from the standpoint of the brewery in connection with that revocation hearing.

A hearing was duly held in the early part of 1925, and an order was issued cancelling the old permit, and declining to issue a renewal for the year 1925. That was in April 1925.

Thereafter, in April 1925, a suit was brought in the District Court for the Middle District of Pennsylvania, in the name of Patrick F. McGowan to enjoin the Commissioner of Prohibition from denying the renewal of that permit for the year 1925, and to require him to rescind his order, the order of revocation of the old permit. Certain attorneys represented Mr. McGowan, who was the ostensible petitioner there, but he did not hire them and did not pay them.

Along in I believe about June 1927, Patrick F. McGowan, and other persons, William F. McHugh, Carl Bossert, William B. Loughran and others were indicted in the District Court of Cleveland, Ohio, for conspiracy, one of the overt acts charged being the handling of beer from this particular brewery.

At the time of Mr. McGowan's arrest, he was not permitted to communicate with his friends before he left home, he being taken away in custody of the marshal, and he left word with his 88 wife to telephone the petitioner. She telephoned to the petitioner, called his home or his office, and the man answered and she told him what the trouble was, and was informed that Mr. McGowan would be taken care of.

Thereafter Mr. McGowan was freed by an attorney by the name of Abe Salsberg, who saw to the furnishing of bond for Mr.



McGowan's release, and thereupon Mr. Salsberg and Mr. McGowan together drove off, stopping on the way back at Mr. Kehoe's house or office.

Mr. McGowan did not pay any of the premiums on the bond, and he did not put up any of the collateral with the American Surety Company to indemnify the surety on the bonds, and at all times where the services of attorneys were necessary, they were not attorneys employed by him, or paid for by Mr. McGowan.

Now, if your Honor please, there will be certain documentary evidence introduced that will be in further corroboration of this sketchy outline which we have attempted to make, but, I believe from this general outline it may be understood that it requires a number of witness to bring together all of these facts which the Government believes will show that the petitioner alone was the lessee and operator of the brewery throughout the year 1925, and was the recipient of its income.

Now, the evidence will further show that at the time the petitioner signed the original consent by him to the assessment of nine thousand and some odd dollars additional tax, in the year 1927, he made no disclosure of the income received by him from this brewery, and he made no disclosure of it at the time he made application for the making of a closing agreement. He made no disclosure at the time he signed it, and at the time he permitted the Commissioner to sign, and the Secretary to approve the closing agreement, and the first information which led the respondent to institute the subsequent investigation on which he based the reopening of the case and upon which the Secretary of the Treasury based a revocation of the closing agreement and upon which the present deficiency is proposed, all came to the knowledge of the Commissioner subsequent to the execution of the so-called closing agreement.

The MEMBER. Mr. O'Hara?

Mr. O'HARA. We desire to reserve our opening statement, your Honor.

Mr. LEMING. I will call Mr. McGowan.

Whereupon PATRICK F. MCGOWAN was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

The CLERK. State your name, please.

The WITNESS. Patrick F. McGowan.

By Mr. LEMING:

Q. Where do you live, Mr. McGowan?

A. 92 McCarraghen Street, Wilkes-Barre, Pennsylvania.



Q. Wilkes-Barre?

A. Yes, sir.

90 Q. How long have you lived there, Mr. McGowan?

A. Since 1922; about 11 years—since 1922.

Q. What were you doing there, in 1922?

A. Well, I was working around at odd jobs here and there, where I could get them.

Q. What were you doing in the year 1923?

A. I was the business manager for the Wilkes-Barre Base Ball Club.

Q. How long did your employment continue with the Wilkes-Barre Base Ball Club?

A. From 1923 up until February 1, 1924.

Q. What compensation or salary did you receive as business manager of that baseball club?

A. About \$300 a month, for about six months.

Q. For about six months?

A. Yes, sir.

Q. What was your employment in the year 1924?

A. As lessee of the P. F. McGowan Brewery.

Q. Is that otherwise known as Bartell's Brewery?

A. Yes.

Q. Of Edwardsville, Pennsylvania?

A. Yes, sir.

Q. How did you come to be the lessee of that brewery?

A. Through Mr. John Kehoe.

Q. Under what circumstances?

A. That I would take over the brewery, through an interview on several occasions which I had with Mr. Kehoe.

Q. How long have you known Mr. Kehoe?

A. From 1922—the latter part of 1922.

Q. I show you a document and ask you if that is your signature on it?

A. Yes.

91 Q. Will you state what that document is on which you have identified your signature?

A. Yes. It is a lease I received from Mr. Schott of Bartell's Brewery.

Mr. LEMING. I offer the lease in evidence.

Mr. GILLESPIE. No objection.

The MEMBER. It will be received and marked as "Respondent's Exhibit A."

(The document referred to was received in evidence and marked "Respondent's Exhibit A," and made a part of this record.)



By Mr. LEMING:

Q. I notice in this document which is marked as "Respondent's Exhibit A," in the lower left-hand corner of page 3, it says, "In the presence of William F. McHugh," and the other signature looks like "E. McGray"; will you state who William F. McHugh was?

Q. How did it happen that William F. McHugh was present when you signed that lease, Mr. McGowan?

A. Because he was present when I made the agreement with Mr. Kehoe to go down to the brewery to sign the lease.

Q. You have testified, Mr. McGowan, that you had an arrangement with John Kehoe?

A. Yes.

Q. Was that an employment arrangement?

A. Yes.

Mr. GILLESPIE. I object to this; it is leading. The witness may be asked to testify to facts, but not in response to such a question as that. That is distinctly leading. He may say what the arrangement was, what his conversation was, what was done or what was said. That is the proper way to proceed, your Honor.

Mr. LEMING. I will accept your amendment.

By Mr. LEMING:

Q. What was said or done at that time, Mr. McGowan?

A. Mr. Kehoe instructed me to go with Billy McHugh, down to Bartell's Brewery and sign the lease.

Q. And that is the document now in evidence as Respondent's Exhibit A?

A. Yes, sir.

Q. What further instructions did Mr. Kehoe give you?

A. He instructed me the day we were going down to sign the lease, that William F. McHugh was to take orders from him and issue orders to me.

Q. Was any bank account opened up about that time?

A. No.

Q. Did you open up a bank account?

A. Yes, sir.

Q. Where?

A. In the Peoples Bank at Edwardsville, Pennsylvania.

Q. Was the account opened in your name?

A. Yes, sir.

Q. I show you a pass book of the Peoples National Bank of Edwardsville and ask you if that is the book given at the time the deposit was made or at the time the account was opened?

A. Yes, sir.



Q. May I inquire at this time if the representative of the Peoples National Bank is here?

A VOICE. Yes.

93 Mr. LEMING. I offer this passbook of the Peoples National Bank in evidence as Respondent's Exhibit B.

Mr. GILLESPIE. We will reserve our right to object to the admission of this exhibit. We do object to its admission unless it is followed by other evidence as connecting links to show the identity of Mr. Kehoe with the account in question.

Mr. LEMING. It will be followed up.

Mr. GILLESPIE. We reserve the right to object at a later period.

The MEMBER. It will be marked as "Respondent's Exhibit B," with the right to the petitioner to object at a later time.

By Mr. LEMING:

Q. I show you a document—

The CLERK. Respondent's Exhibit B.

(The passbook referred to was received in evidence and was marked "Respondent's Exhibit B," and made a part of this record.)

By Mr. LEMING:

Q. I show you a document, Mr. McGowan, and ask you if your signature is on that?

A. Yes, sir.

Q. Was that the deposit slip made out at the time the deposit was made in Respondent's Exhibit B?

A. Yes, sir.

Q. Mr. McGowan, you have identified this Peoples National Bank passbook as showing a deposit of \$6,000 in your name?

A. Yes, sir.

Q. You have also identified your signature on a deposit slip?

A. Yes, sir.

94 Q. And that is captioned here "Peoples National Bank, February 15, 1924"?

A. Yes, sir.

Q. I ask you if you know why the date on the deposit does not correspond to the date of the entry in the pass?

A. I do not know.

Mr. GILLESPIE. Just a moment, if the Court please. What is the answer?

The WITNESS. I do not know.

Mr. GILLESPIE. No objection.

Mr. LEMING. I offer the deposit slip in evidence.

Mr. GILLESPIE. Just a moment. It has not been identified as the deposit slip in question.

Mr. LEMING. He said he only made one deposit.



Mr. GILLESPIE. That is argument; only the facts are to be admitted; that is only making an assumption.

We object to the offer of the deposit slip in evidence showing a deposit in the Peoples National Bank, February 15, 1924, cash \$6,000, to sustain a deposit shown in the Government's Exhibit A, namely, in the Peoples National Bank, in the name of Patrick F. McGowan of \$6,000 on March 1, 1924. This deposit was February 15, 1924, and there is no connection between the deposit book and the deposit slip. Therefore, the deposit slip cannot sustain the deposit book in any way and is incompetent, irrelevant, and immaterial, and we object to the offer of it in evidence.

Mr. LEMING. If your Honor please, the papers I have 95 in my hand were subpoenaed from the Peoples National Bank of Edwardsville on subpoena duces tecum, and the gentleman who represents the bank very kindly handed them to me just now. He was subpoenaed to bring the papers showing deposits made in this particular account.

I wish to ask that this be marked for identification and in due time I will call the bank officer to show—

Mr. GILLESPIE. There is no objection to the marking for identification.

The MEMBER. It may be marked the next exhibit number for identification.

The CLERK. It will be marked Respondent's Exhibit C for identification.

(The document referred to was thereupon marked "Respondent's Exhibit C," for identification.)

Mr. LEMING. The witness has testified he cannot explain the discrepancy in the dates, but the bank officer is here, and if it is agreeable this bank officer, perhaps, would like to get away, and if I might interrupt the testimony of Mr. McGowan, I think we might let the bank officer go home.

Mr. GILLESPIE. No objection.

Mr. LEMING. If that is agreeable with your Honor.

The MEMBER. No objection.

Mr. LEMING. Mr. McGowan, will you step down a moment, please.

(Witness excused.)

96 Whereupon WILLIAM E. MORRIS was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mr. Morris, you were served with a subpoena to produce certain records, I believe, from the Peoples National Bank of Edwardsville?



A. Yes, sir.

Q. And did you produce those records?

A. Yes, sir.

Q. And this is a copy of the subpoena?

A. Yes, sir.

Mr. GILLESPIE. Will you ask him what his official capacity is, please, Mr. Leming?

By Mr. LEMING:

Q. Mr. Morris, you reside at Edwardsville, Pennsylvania?

A. Yes, sir.

Q. Are you employed by the Peoples National Bank there?

A. Yes, sir.

Q. In what capacity?

A. Assistant Cashier.

Q. Assistant Cashier?

A. Yes, sir.

Q. Now, may I have a copy of your subpoena a moment, please?

A. Yes.

Q. This subpoena directed that you bring with you ledger sheets of the account of William F. McGowan for 1924 and 1925; did you bring that?

A. Yes, sir.

Q. May I see that, please?

A. There are two. We changed our system about that time.

Q. You mean there are two ledger sheets?

97 A. Yes, sir.

Q. I see.

Mr. LEMING. May these be marked for identification, please?  
(There was a discussion off the record.)

By Mr. LEMING:

Q. Mr. Morris, will you explain how you happened to have two ledger sheets?

A. When this account was opened we used this (indicating) ledger sheet—

Q. Which one do you have in your hand?

A. The original, the first one.

Mr. LEMING. We will have that marked for identification, and then you will have something to identify it by.

Mr. GILLESPIE. All right.

The MEMBER. It will be marked for identification as Respondent's next exhibit.

The CLERK. Exhibit D.

(The document referred to was thereupon marked "Respondent's Exhibit D," for identification.)



By Mr. LEMING:

Q. Now, do you have a continuation sheet of that account, Mr. Morris?

A. Yes, sir.

Q. Will you let me have it, please?

A. Yes, sir.

Mr. LEMING. May that be marked for identification?

The MEMBER. It will be marked for identification as the next exhibit.

The CLERK. Respondent's Exhibit E for identification.

98 (The document referred to was thereupon marked "Respondent's Exhibit E," for identification.)

By Mr. LEMING:

Q. Now, these two ledger sheets marked, respectively, for identification, D and E, do you say these are the ledger sheets of Patrick F. McGowan's Account?

A. Yes, sir.

Q. Now, you were asked to bring the signature card on file in connection with that account; do you have it?

A. Yes, sir.

Mr. LEMING. May that be marked for identification, please?

The MEMBER. It will be marked as respondent's next exhibit.

The CLERK. Exhibit F for identification.

(The document referred to was thereupon marked "Respondent's Exhibit F," for identification.)

By Mr. LEMING:

Q. Now, you were asked to bring all of the canceled checks charged to that account; do you have those, Mr. Morris?

A. Yes, sir.

Mr. LEMING. May I see them?

The WITNESS. Yes.

Mr. LEMING. May I ask—

By Mr. LEMING:

Q. Do the cancelled checks which you have handed me exhaust or close the account in question?

A. Yes, sir.

Q. How many are there of those checks, canceled checks?

A. Four.

99 Mr. LEMING. May these four checks which the witness has identified as the canceled checks applicable to this account be marked for identification by the next letter?

The MEMBER. They will be marked for identification as Respondent's next exhibit. Do you wish those marked separately?

Mr. LEMING. They may be all marked as one letter, your Honor.



The CLERK. Exhibit G for identification.

(The checks referred to were thereupon marked "Respondent's Exhibit G", for identification.)

By Mr. LEMING:

Q. Mr. Morris, you were asked to bring the deposit slip or slips applicable to that account; did you do that?

A. Yes, sir.

Q. Will you let me see that?

A. Yes.

Mr. LEMING. The document has been previously marked for identification as Respondent's Exhibit C, and at that juncture we had let the witness then on the stand, Mr. McGowan, step aside for Mr. Morris to take the stand. Mr. Morris now testifies this is the deposit slip brought by him as applicable to this account.

By Mr. LEMING:

Q. Mr. Morris, I call your attention to the deposit slip marked for identification as Respondent's Exhibit C and to the first sheet of the ledger account marked for identification as Respondent's Exhibit D, and I call your further attention to the fact the deposit slip also shows the date February 15, 1924, while the ledger sheet shows the deposit in that amount as of March 1, 1924; what explanation, if any, have you for that, please?

100. A. I have not any definite explanation. We concluded—

Mr. GILLESPIE. Just a minute. I object to the witness making any conclusion.

The MEMBER. Just state what you know.

Mr. GILLESPIE. May that be stricken?

Mr. LEMING. He did not say anything.

By Mr. LEMING:

Q. You brought the papers which were subpoenaed, did you, Mr. Morris?

A. Yes, sir.

Q. And you found no other deposit slip applicable to that account?

A. No, sir.

Mr. GILLESPIE. Just a moment. I object to the question—

Mr. LEMING. I think it is a fair question.

The MEMBER. That objection will be overruled.

Mr. GILLESPIE. Exception.

The MEMBER. Exception noted.

By Mr. LEMING:

Q. Did you examine the bank's records to see if there was any other account of Patrick F. McGowan?



A. Yes, sir.

Q. Did you find any other account?

A. No, sir.

Mr. LEMING. I offer in evidence Respondent's Exhibits heretofore marked for identification C, D, E, and F, being the deposit slips for \$6,000, the ledger sheet marked for identification as Respondent's Exhibit D, and I wish to include with that the second ledger sheet marked for identification as Respondent's Exhibit E, and the identification card marked—the signature card marked for identification as Respondent's Exhibit F, and also the canceled checks which exhausted that account, marked for identification as Respondent's Exhibit G.

Mr. GILLESPIE. You have made the offer?

Mr. LEMING. Yes, sir.

Mr. GILLESPIE. If the Court please, at this time perhaps I have no right to object to the offer in evidence but I wish to note in the record that I reserve the right later to object and ask to have them stricken out if, on cross-examination, the witness cannot sustain the credibility of his records.

The MEMBER. They will be admitted with the understanding the petitioner may move to strike if they are not corroborated.

Mr. LEMING. That is all. Take the witness.

Cross-examination by Mr. GILLESPIE:

Q. Mr. Morris, you say you are the Assistant Cashier?

A. Yes, sir.

Q. Have you access to all of the records of that bank in connection with deposits?

A. Yes, sir.

Q. Records of both deposits and withdrawals?

A. Yes, sir.

Q. Have you sole charge of those records?

A. I have access to them.

Q. You have access to them, but you do not make up the records, do you?

A. Not all of them.

102 Q. You merely assume that because they are a part of the files they are valid, you presume that, do you not?

Mr. LEMING. He said he examined the records.

Mr. GILLESPIE. He may examine them, but that does not mean he knows anything about them.

By Mr. GILLESPIE:

Q. You merely know they are there: is that right?

A. Yes, sir.

Q. But you have not made any of these records personally in your capacity as Assistant Cashier?



A. No, sir.

Q. You do not know who made them, as a matter of personal knowledge?

A. I can tell by the writing on the deposit ticket.

Q. Which do you call a ticket?

A. The deposit ticket.

Q. The deposit slip?

A. Yes, sir.

Q. This [indicating] is what you call the deposit ticket?

A. Yes.

Q. And that is Government Exhibit C?

A. Yes.

Q. Is that the only way by which you identify any and all of these records, by knowing the handwriting on the deposit slip, which is presumably that of Patrick F. McGowan?

A. We have various records—

Q. I did not ask you that. I am speaking of this particular record. Read the question, please.

(The question was read aloud by the Reporter as above recorded.)

103 The WITNESS. No, but that is the way I identified that—

By Mr. GILLESPIE:

Q. I am speaking of the records generally.

A. Which records, for example?

Q. All of those which you identified here and which you heard offered in evidence. Now, can you answer my question as to that?

A. Yes. That is how that [indicating] is put in, by machine work.

Q. That is the only way you have of identifying the records?

A. That is all, and by the signature.

Q. That is the only way you have of identifying the records of your bank, that is, by the fact that upon this deposit slip originally the name of Patrick F. McGowan appears?

A. Yes.

Q. That is correct, is it?

A. Yes.

Q. And did you see Patrick F. McGowan write the name upon this deposit slip?

A. No, sir.

Q. So you do not know whether it is his name or not?

A. No, sir.

Q. That is, you do not know whether that is his signature or not; you do not know that?



A. Only by the signature card.

Mr. LEMING. You have heard the witness testify that it was his handwriting.

Mr. GILLESPIE. That is argument. Let him testify of his own knowledge.

By Mr. GILLESPIE:

Q. That is correct, now, is it, that you do not know his handwriting?

104 A. No.

Q. You never saw him write?

A. No, sir.

Q. And any checks that may have come in with that name may or may not have been those of Patrick F. McGowan?

A. They correspond to the signature.

Q. The name corresponds with the name on the slip; is that what you mean?

A. Yes.

Q. But it may not be the same signature, by the identical person, by the identical McGowan; is that right?

A. They would not be paid if they were not.

Q. I am not asking you that. I am just asking you a simple question. There appears on the four checks the name of Patrick F. McGowan?

A. Yes.

Q. And also on this slip?

A. Yes.

Q. But you do not know that it is the Patrick F. McGowan, the witness who preceded you upon the stand that—

A. No; I never saw him write.

Q. It may be any other Patrick F. McGowan; is that true or not?

A. Not in this case, because we are guided wholly by the signature card.

Q. You do not know which Patrick McGowan it was, do you?

A. I told you I never saw him write.

Q. I did not ask you that just now. You do not know, as a matter of fact, or from your own personal knowledge?

A. I never saw him write.

Q. "Yes" or "no," please.

105 A. Well, I must say "no," but I also say "yes" because we are guided by the signature card.

Q. When you say signature and name, you mean two different things; I might write the name, but it would not be his signature, and if that now appears there and you say it is his signature you would have to know that he wrote it in order to warrant you in acting upon it?



A. Yes.

Q. And still you never saw him write?

A. No.

Q. And you were not familiar with his signature?

A. Not other than the signature card.

Q. And these are typed records?

A. Yes, sir.

Q. And you do not know whether the one who typed them knew the signature of Patrick F. McGowan as genuine?

A. I do not.

Mr. GILLESPIE. I object to the records in evidence, if the Court please.

The MEMBER. The objection will be overruled.

Mr. GILLESPIE. Note an exception, please.

The MEMBER. An exception will be noted.

By Mr. GILLESPIE:

Q. You do not know whether Patrick F. McGowan's signature or the words "cash \$6,000" are in his handwriting at all, either one of them?

A. I know the cash is not his handwriting.

Q. That is not his handwriting?

A. No.

Q. And you do not know that it is his handwriting where the name appears; you said that, too, did you not?

106 A. That is right.

Q. But you know the item of \$6,000 is not in his handwriting?

A. Just the word "cash."

Q. That is all?

A. Yes.

Q. You know that is not his, but do you know whose it is?

A. Yes.

Q. Whose is it?

A. L. L. Reese.

Q. You are the Assistant Cashier?

A. Yes.

Q. But you do not know any more than appears there?

A. That is right.

Q. Now, Mr. Morris, I call your attention specifically to a discrepancy in the dates appearing upon the slip, so-called, which appears to be February 15, 1924; is that correct?

A. Yes.

Q. And the entry upon the deposit book, which appears to be March 1, 1924. I show you that. Is that correct?

A. Yes.



Q. How do you explain the discrepancy in these dates, if you know?

A. You make it specific?

Q. Sir?

A. You are asking a specific question?

Q. Naturally.

A. I do not know.

Q. You are making the specific answer that you do not know?

A. What the discrepancy is.

Q. You cannot explain it?

107 A. We think maybe he came in—

Q. That is not responsive.

Mr. GILLESPIE. We object to the answer, if the Court please. I am asking him what he knows. If he does not know, he may say so.

The MEMBER. Please read the question and answer.

(The question and answer referred to were read aloud by the Reporter as above recorded.)

The MEMBER. Your motion to strike will be denied. I think it is responsive.

Mr. GILLESPIE. Very well.

By Mr. GILLESPIE:

Q. Now, you have little knowledge of these transactions personally?

A. Yes, sir.

Q. You have little knowledge?

A. Yes.

Q. You have practically no knowledge except as to the fact the entry of \$6,000 was in the handwriting of the cashier?

A. Just the word "cash."

Q. Would you say the figures are his?

A. They are not his.

Q. They are not whose?

A. L. L. Reese, Cashier.

Q. L. L. Reese wrote the word "cash" but did not write the numerals \$6,000?

By Mr. GILLESPIE:

Q. Now, I also call your attention to a signature card, Exhibit F, for identification by the respondent, and particularly to the date, March 4, 1924, and I now ask you, can you explain the discrepancy between the entry upon the deposit slip of February 15, 1924 and the entry upon the deposit book of March 1, 1924, and the date upon the signature card of March 4, 1924?

A. No, sir.



Q. Do you know how it happened or anything about the facts and circumstances?

A. No, sir.

Mr. GILLESPIE. I renew my objection against the admission of these items in evidence.

The MEMBER. Are you moving to exclude—

Mr. GILLESPIE. I renew my motion to strike out these exhibits.

The MEMBER. The motion be denied.

Mr. GILLESPIE. Exception; if your Honor please.

The MEMBER. Exception noted.

Mr. GILLESPIE. That is all.

Mr. LEMING. That is all, Mr. Morris.

(Witness excused.)

AFTERNOON SESSION

Met, pursuant to recess, at 1:45 p. m.

Whereupon, PATRICK F. MCGOWAN, having heretofore been first duly sworn, resumed the stand and was further examined and testified as follows:

Direct examination (continued) by Mr. LEMING:

Q. Mr. McGowan, where did you get the \$6,000 deposited in the Peoples National Bank?

109 A. Some time about the middle of February I was called by John Kehoe to come to his office; and there I met Mr. Kehoe and William F. McHugh. We talked over the lease of the brewery, and he said it was near the time to pay the first installment on the lease. Later, or about the time we were going to leave, Mr. McHugh said there is \$6,000 which was on Mr. Kehoe's desk, and take it with you. When I picked up the money Mr. McHugh said, "Don't forget to count it," so I counted it and put it in my pocket, and went to Wilkes-Barre.

The next day I met Mr. McHugh and went over to the Peoples Bank at Edwardsville, and Mr. McHugh and the cashier or the assistant, I do not know which, had a conversation, and there I was instructed to deposit that money.

Q. Mr. McGowan, is Mr. McHugh dead or alive?

A. He is dead.

Q. Did you later get your pass book and bank book from that bank?

A. Yes, sir.

Q. You said that you later got the bank book from the Peoples Bank, and I call your attention to Respondent's Exhibit B, and will ask you if that is the book you got?

A. Yes, sir.



Q. I show you a document and will ask you if that is your signature on it? [Handing paper to witness.]

A. Yes, sir.

Q. What is this document on which you identified your signature?

A. Granting George Buss power of attorney to get my permit.

Q. What is the style of the document, how is it addressed and how is it signed?

A. Addressed to Mr. Murdock, and signed by P. F. McGowan.

Q. What is Mr. Murdock's title as shown by that document?

A. He was the Prohibition Administrator at that time.

Q. At what place?

A. At Philadelphia.

Mr. LEMING. Mark this for identification, the paper that the witness has just identified.

The CLERK. Respondent's Exhibit H for identification.

(The document referred to was thereupon marked "Respondent's Exhibit H" for identification.)

By Mr. LEMING:

Q. Under what circumstances was that letter sent by you, Mr. McGowan?

A. Following instructions from John Kehoe.

Mr. LEMING. I offer the letter in evidence.

Mr. GILLESPIE. No objection at the present time. We may reserve our right to strike.

The MEMBER. You will have the privilege of making a motion to strike. It will be received as Respondent's Exhibit H.

(The document referred to was received in evidence and marked "Respondent's Exhibit H," and made a part of this record.)

By Mr. LEMING:

Q. I show you a document and ask you to state, if you can identify your signature on that?

A. Yes, sir.

Q. What is that document, Mr. McGowan?

A. That is the permit.

111 Q. I will ask you to read the caption that will identify it.

A. "An application for permit under the National Prohibition Act."

Q. What is the date at the top?

A. February 9, 1924.

Q. And that is your signature on it?

A. Yes, sir.

Mr. LEMING. May this be marked for identification? [Handing paper to Clerk.]



The MEMBER. It will be marked for identification Respondent's Exhibit I.

(The document referred to was thereupon marked for identification "Respondent's Exhibit I.")

By Mr. LEMING:

Q. Now, referring to this application for permit dated February 9, 1924, which you say you signed, and which has been marked for identification Respondent's Exhibit I, under what circumstances did you sign that?

A. Under the instruction of Mr. Kehoe.

Q. John Kehoe?

A. Yes, sir.

Q. Referring to this application for permit, marked for identification Respondent's Exhibit I, will you state, Mr. McGowan, whether or not you received a permit after the making of that application?

A. Yes, sir.

Q. Do you recall at about what time you first saw the permit?

A. About July 2nd, or July 3rd, 1924.

Q. Did you turn that permit over to Special Agent Lucas?

A. Yes, sir.

112 Q. Who gave you the permit?

A. Mr. George Buss.

Q. Did you ever see Mr. George Buss' signature?

A. No, sir; I don't think so.

Q. You never saw him write his signature?

A. No.

Mr. LEMING. I then offer in evidence application for permit which has been marked for identification "Respondent's Exhibit I."

Mr. GILLESPIE. No objection to that.

The MEMBER. It will be admitted and marked "Respondent's Exhibit I."

(The document referred to was received in evidence and marked "Respondent's Exhibit I," and made a part of this record.)

By Mr. LEMING:

Q. Mr. McGowan, do you know where Mr. Buss now is?

A. Mr. Buss is dead.

Q. Do you know when he died?

A. About Wednesday or Thursday of last week.

Mr. LEMING. Is there any disagreement about the fact of his death which was reported on Friday?

Mr. GILLESPIE. He is dead today, but I don't know exactly when he died.



Mr. LEMING. Friday of last week. Just so the record is clear, that is agreed.

Mr. GILLESPIE. That is correct.

By Mr. LEMING:

Q. Mr. McGowan, I show you another document and will ask you if you can identify your signature on that? [Paper was handed to witness.]

A. Yes, sir; that is my signature.

Q. What is this document on which you have identified your signature; will you examine the caption of the document and state what it shows?

A. It is an application for a permit.

Q. Will you read what it says on the caption of that document?

A. Renewal for 1925. Application for permit under National Prohibition Act.

Q. Was it an application to renew the previous permit for the year 1925?

A. I guess it was.

Mr. GILLESPIE. Not a guess.

Q. That is what it shows?

A. It shows on the top that is a renewal application. The permit for 1924 was Pa-L-164, and this is Pa-L-164, renewal of it.

Mr. LEMING. The application renewal shows what it is. I ask that this be marked for identification.

The MEMBER. It will be marked for identification "Respondent's Exhibit J."

(The document referred to was thereupon marked "Respondent's Exhibit J." for identification.)

By Mr. LEMING:

Q. Under what circumstances did you sign that document, Mr. McGowan, which has been marked for identification Respondent's Exhibit J, being the application for renewal permit?

A. Upon instructions from John Kehoe.

Q. Now, Mr. McGowan, you have testified that you had received your permit under the application of February 9, 1924. I will ask you to examine the document you now have in your hand, and ask you to state whether or not that is the permit (I might say that document was turned over to Mr. Lucas by Mr. McGowan, and that is the reason I have it in my custody)?

114 A. Yes, sir.

Mr. LEMING. Any objection to that going in evidence?

Mr. GILLESPIE. No objection.



Mr. LEMING. I offer the permit in evidence, which was issued under the application of February 1924, the permit being dated June 18, 1924.

The MEMBER. It will be admitted and marked "Respondent's Exhibit K."

(The document referred to was received in evidence and marked Respondent's Exhibit K," and made a part of this record.)

By Mr. LEMING:

Q. Is that document, Respondent's Exhibit K, the one delivered to you by Mr. Büss?

A. Yes, sir.

Q. Now, did you get a permit upon your application to renew the original permit for the year 1925?

A. I cannot recall.

Q. I call your attention to a document turned over by you to Special Agent Lucas, and will ask you if it is not a fact that is the permit received under the renewal application?

A. Yes, sir.

Mr. LEMING. I offer the permit which is dated July 24, 1925, which the witness has just identified, in evidence.

Mr. GILLESPIE. No objection.

The MEMBER. It will be admitted and marked "Respondent's Exhibit L."

(The document referred to was received in evidence and marked "Respondent's Exhibit L," and made a part of this record.)

115 Mr. LEMING. I also wish my offer to include the application for that permit which has been previously marked for identification Respondent's Exhibit J.

Mr. GILLESPIE. No objection.

The MEMBER. The document may be admitted and marked "Respondent's Exhibit J."

(The document referred to was received in evidence and marked "Respondent's Exhibit J," and made a part of this record.)

Mr. LEMING. These two documents, the one which is the application, and the one the permit, are both now admitted.

The MEMBER. Both are admitted.

By Mr. LEMING:

Q. I call your attention, Mr. McGowan, to the application for renewal for the permit, Respondent's Exhibit J, and to the fact that it is dated July 28, 1924, and to the fact that the permit issued under it is dated July 24, 1925. Do you know what intervened to cause such a wide variance between those two dates?

A. Yes.

Q. What was it?



A. We had some trouble at the plant with the Administrator in regard to a raid being made on the plant.

Q. When did that occur?

A. Well, I just can not recall, but it was two different department men by the name of Bennett and Dodd.

Q. What did they do; did they seize some cars, or just what was it?

A. There were four cars seized at that time coming out on the siding, and I do not know what happened in regard to the permit or anything up to that time. I know we had some trouble on account of those four cars being seized, which delayed the granting of the permit.

Q. To refresh your recollection, did you have a revocation proceeding with respect to the permit which was issued for the year 1924?

A. Yes; we had a hearing in the post office in Wilkes-Barre before a man by the name of Shannon.

Q. To refresh your recollection, I will ask you if that was not as a matter of fact in December, 1924?

A. Well, I just can not recall the date.

Q. Now, what transpired between you and Mr. Kehoe, if anything immediately preceding that revocation hearing?

A. Well, I was called to Mr. Kehoe's office, and was told there was a hearing—

Mr. GILLESPIE. I object to the question, and the part of his answer unless it is shown that the conversation was had with Mr. Kehoe, or in his presence. I object unless he identifies Mr. Kehoe to have been present.

Mr. LEMING. I understood him to say that he was called to Mr. Kehoe's office.

The MEMBER. I did not hear anything of the kind.  
Mr. LEMING. Maybe I can straighten that up in this way.

By Mr. LEMING:

Q. Who called you to Mr. Kehoe's office?

A. Mr. Kehoe in regard to this hearing that was to be held in the post office.

Q. This revocation proceeding?

A. Yes, sir.

Q. Did you go to his office?

A. Yes, sir.

117 - Q. What did he say to you, and what did you say to him, if anything?

A. He instructed me to meet Mr. William F. McHugh in Evan C. Jones' office in Wilkes-Barre the night before the hearing between seven and eight o'clock.



Q. Did you go to Evan C. Jones' office?

A. Yes, sir.

Q. Was Mr. McHugh there?

A. Yes, sir.

Q. What did he do when you got there?

A. Well, we talked the matter over with Mr. Jones. He was going to act as my attorney.

Q. Did you employ Mr. Jones?

A. No.

Mr. GILLESPIE. I ask that that be stricken out as immaterial and irrelevant.

The MEMBER. The objection will be overruled.

By Mr. LEMING:

Q. Did you pay Mr. Jones for his services in that connection?

A. No, sir.

Mr. GILLESPIE. That is objected to. That is the particular thing that I objected to.

Mr. LEMING. He certainly ought to know an answer to that.

The MEMBER. Objection will be overruled.

Mr. GILLESPIE. May we reserve an exception?

The MEMBER. Exception will be noted.

By Mr. LEMING:

Q. Now, what happened to the permit after that?

A. Why, I don't know.

Q. Well, do you recall any proceeding in court?

A. No.

Q. You don't recall a proceeding in court?

A. No.

Q. To refresh your recollection, I hand you a document and I will ask you to read it, not out loud, but to yourself.

(Witness does as directed.)

Q. Now, counsel have also read the document that I submitted to the witness to read, and I will ask the witness if that document refreshes his recollection as to any court proceeding?

A. Yes; it does.

Mr. LEMING. Has counsel any objection to this document going in evidence?

Mr. GILLESPIE. If it is material in any way.

Mr. LEMING. I think it is material. It has to do with the issuance of the original permit, and the renewal of the permit. This paper by the way, is taken from what I call the Bureau of Internal Revenue file; I have two files here, one the Department of Justice, which was turned over to me to have here under the subpoena, and then the Bureau file which is here, as you see. Now, this particular document was taken from the Bureau of



Internal Revenue file, and this has on it "Certification by the Clerk of the Court" at the bottom.

Mr. GILLESPIE. I would suggest there has been no proof of a revocation. There has been no order or revocation entered, and until there is, this does not consistently follow.

The MEMBER. I do not know what the document is.

Mr. GILLESPIE. I will withdraw my objection and let it go in just as though Mr. Leming has shown a revocation.

119 The MEMBER. Will you please state what that document is?

Mr. LEMING. I started out by asking this witness to refresh his recollection about a court proceeding. This document I have in my hand is a decree of the United States District Court for the Middle District of Pennsylvania, directing the Prohibition Director to renew that permit for the year 1925.

The MEMBER. I understand there is no objection?

Mr. GILLESPIE. No objection.

The MEMBER. It will be admitted as Respondent's Exhibit M. (The document referred to was received in evidence and marked "Respondent's Exhibit M." and made a part of this record.)

Mr. LEMING. Perhaps I should read this document so that your Honor will be fully advised as to what this document is:

"In the District Court of the United States for the Middle District of Pennsylvania.

"Patrick F. McGowan vs. David H. Blair, Commissioner of Internal Revenue et al., No. 471, March Term, 1925, In Equity.

"Decree. And now, to wit: this 11 day of July A. D. 1925, this cause having come on to be heard at this term and brief submitted by counsel, and thereupon, upon consideration thereof on the — day of June A. D. 1925, the Honorable O. B. Dickinson, District Judge, announced his decision reversing the action of defendants in revoking plaintiff's permit, it is therefore ordered, adjudged, and decreed as follows, viz:

120 That the action of the defendants, David H. Blair, Commissioner of Internal Revenue; Roy A. Haynes, Federal Prohibition Commissioner; and Wm. G. Murdock, Director for the State of Pennsylvania, in revoking and cancelling Permit Pennsylvania L' 164, issued to Patrick F. McGowan, the plaintiff, be and the same is hereby reversed, and said permit shall be in full force and effect, until defendants approves the application for renewal of same in accordance with this decree.

"That the action of the defendants, David H. Blair, Commissioner of Internal Revenue, Roy A. Haynes, Federal Prohibition Commissioner, and Wm. G. Murdock, Federal Prohibition Direc-



or for the State of Pennsylvania, in refusing plaintiff's application for a renewal of permit Pennsylvania 'L' 164, for the year 1925, be and the same is hereby reversed, and the defendants are ordered and directed to approve the application heretofore filed for a renewal of said permit, and to forthwith issue to plaintiff a renewal of Permit Pennsylvania 'L' 164, for the year 1925.

"By the Court, Dickinson, United States District Judge, Specially Presiding."

By Mr. LEMING:

Q. Now, Mr. McGowan, do you know what attorney represented you as plaintiff in that proceeding referred to in Respondent's Exhibit M?

A. No, sir.

Q. Did you employ any attorney to represent you in that proceeding?

A. No, sir.

Q. Going back a moment to the revocation proceeding, you testified that Mr. Kehoe told you that Evan C. Jones would be your attorney?

A. Yes, sir.

121 Mr. WHITE. That is not what he testified to.

Mr. LEMING. I am not trying to change his testimony. It is entirely subject to correction.

Mr. WHITE. What he testified to was that he was called to Mr. Kehoe's office and told to meet Mr. McHugh at Jones' office between seven and eight.

By Mr. LEMING:

Q. What other attorney appeared at that revocation proceeding in addition to Mr. Evan C. Jones, if you know or recall?

A. I can not recall.

Q. Did you yourself employ any attorney at that revocation proceeding?

A. No, sir.

Q. Do you know William H. Gillespie?

A. Yes, sir.

Q. Do you see him present now?

A. Yes, sir.

Q. Is he one of counsel at the table?

A. Yes, sir.

Q. Did you employ him in that revocation proceeding?

A. No, sir.

Q. Do you know Harvey L. Rabbitt?

A. No, sir.

Q. Did you employ him as attorney in that revocation proceeding?

A. No, sir.



Q. Now, Mr. McGowan, do you recall how you received permit dated July 24, 1925, which was the renewal of the 1924 permit?

A. No, sir.

Q. You do not recall how you received it?

122 A. No, sir.

Q. Mr. McGowan, were you required to give a bond in connection with the issuance of the permit under your original application on February 9, 1924?

A. Yes, sir.

Q. Do you recall the amount of that bond?

A. \$10,000.

Q. I show you a document and ask you to state whether or not you recognize your signature on it?

A. Yes, sir.

Mr. LEMING. May I have this marked for identification?

The CLERK. Respondent's Exhibit N for identification.

(The document referred to was thereupon marked "Respondent's Exhibit N," for identification.)

By Mr. LEMING:

Q. I show you another document and will ask you if you recognize your signature on it?

A. Yes, sir.

Mr. LEMING. May this be marked for identification.

The MEMBER. It will be marked for identification "Respondent's Exhibit O."

(The document referred to was thereupon marked "Respondent's Exhibit O" for identification.)

By Mr. LEMING:

Q. I call your attention, Mr. McGowan, to these two documents on which you have identified your signature, and which are now marked for identification as "Respondent's Exhibits N and O." On the caption of one it says, "Application for Permit to

123 Manufacture Cereal Beverages under the National Prohibition Act," and the one marked for identification "Exhibit N" has the top date December 28, 1925, and the one marked "Exhibit O" for identification has at the top a date January 9, 1926. Would you state under what circumstances you executed those documents, Mr. McGowan?

A. I don't understand you.

Q. Were those documents you have in your hand applications for the renewal of the permit?

A. Yes, sir.

Q. And as shown on the face for the year 1926, are they not?

A. Yes; and 1925.



Q. Well, at the time you signed those two applications, what was the status of your employment?

A. That I cannot recall. I cannot recall that at that time. They were made up, I think, through Mr. William F. McHugh.

The MEMBER. I do not hear you.

The WITNESS. I cannot recall how those were made up, or how they were made out, for I had very little to do with that, and I cannot really recall just exactly how they were made up.

Mr. LEMING. I see. The answer is all right, but I think the witness has misconstrued my question, and I will ask it in this way.

By Mr. LEMING:

Q. Was your employment the same at this date as it was in the beginning?

A. Yes, sir.

Mr. LEMING. I offer these two documents in evidence.

Mr. GILLESPIE. No objection for the present, of course, subject to a motion to strike.

The MEMBER. They will be admitted.

124 Mr. LEMING. I understand that the admission is unqualified. I understand there is no equivocation about the admission.

The MEMBER. They are admitted and marked "Respondent's Exhibits N and O."

(The documents referred to were received in evidence and marked, respectively, "Respondent's Exhibits N and O," and made a part of this record.)

Mr. LEMING. As I understand, counsel has the right to move to strike, but the exhibit goes in without equivocation. Counsel for both sides has that privilege.

By Mr. LEMING:

Q. Mr. McGowan, do you know who became the surety on your bond under your first application for a permit?

A. No.

Q. To refresh your recollection, I will ask you if it wasn't the American Surety Company?

A. Oh, yes; the American Surety Company.

Q. Did you put up any collateral with the American Surety Company as an inducement to them to make that bond?

A. No.

Q. Do you know Mr. John Kehoe's signature?

A. No, sir.

Q. You could not testify as to his signature?

A. No, sir.



Q. Did you have anything to do with the American Surety Company making that bond?

A. No, sir.

Q. Did you ever pay any premiums on that bond?

A. No, sir.

Q. I show you a document taken from the official files of the Department, for instance, this comes from the files turned  
125 over to me by the Department of Justice for presentation here, and I will ask you if you can identify your signature on that?

A. Yes, sir.

The MEMBER. We will take a recess for five minutes.

(Thereupon a recess was taken for five minutes at the conclusion of which the following occurred:)

By Mr. LEMING:

Q. Mr. McGowan, I believe I had asked you to identify a document, as to whether or not you had signed it, and you had said that was your signature, and then counsel was examining the document at the time we recessed. I now call your attention to another document attached to the same one on which you have just identified your signature and ask you to state whether or not that is your signature?

A. Yes, sir.

Mr. LEMING. I offer the two documents upon which the witness has just identified his signature as to each document, and simply as a matter of expedition, I will say the first one identified by his signature is a surety bond in the amount of \$25,000, and the second item is a transmittal letter signed by him, transmitting the bond. These two documents come from the official files turned over to me by the Department of Justice. [Hands papers to counsel for Petitioner.]

I offer those two documents in evidence.

The MEMBER. Any objection?

Mr. GILLESPIE. No objection, sir.

The MEMBER. They will be admitted and marked "Respondent's Exhibit P."

126 (The document referred to was received in evidence, and was marked "Respondent's Exhibit P." and made a part of this record.)

By Mr. LEMING:

Q. I show you, Mr. McGowan, three documents which are pinned together and will ask you to identify, if you will, your signature upon each of the documents.

A. Yes, sir.



Mr. LEMING. Those documents come from the official files of the Department of Justice and were turned over to me for production here.

(Hands papers to counsel for petitioner.)

Mr. LEMING. While counsel is examining that, I will ask you, Mr. McGowan, to examine these four documents in that group pinned together, and see if you can identify your signature upon each of them.

The WITNESS. Yes, sir.

Mr. LEMING. Counsel has now examined the first series on which the witness has identified his signature, consisting of a letter of transmittal signed by him February 10, 1926, addressed to F. C. Baird, Prohibition Administrator, attached to which are two permits, both of which bear date of January 30, 1926. They are simply duplicate originals, as the permits show. I offer that in evidence.

Mr. WHITE. Will you indicate the source, please, Mr. Leming?

Mr. LEMING. The Department of Justice files.

Mr. GILLESPIE. No objection.

The MEMBER. They will be received and marked "Exhibit Q."

(The documents referred to were received in evidence, 127 and were marked "Respondent's Exhibit Q," and made a part of this record.)

Mr. LEMING. Counsel having examined the second series consisting of a letter of transmittal dated June 12, 1926, addressed to Edgar R. Rae, Acting Prohibition Administrator, signed Patrick F. McGowan, to which are attached duplicate original permits, dated June 6th and a permit dated January 30, 1926, which I offer in evidence.

Mr. GILLESPIE. No objection, sir.

The MEMBER. They will be admitted and marked.

The CLERK. Exhibit R.

(The documents referred to were received in evidence, and were marked "Respondent's Exhibit R", and made a part of this record.)

Mr. WHITE. Will you state the source?

Mr. LEMING. Department of Justice files.

If there is any question about any of those, we can substitute any of these exhibits and take them out of the Department of Justice file. As you will observe from these letters the permits were sent out in triplicate, and they would instruct the permittee to sign all of them and return two and retain one. That is the way two of the duplicate originals get back into the Washington file.

It will be observed, in that connection, in that last exhibit, he was returning two of the copies of the permit of June 7, 1926. I



now take, from the papers furnished us by Mr. McGowan, the duplicate original of the permit dated June 7, 1926, and I will ask the witness if that is his signature on the back of it?

The WITNESS. Yes, sir.

Mr. LEMING. I will offer that in evidence.

128 (Hands papers to attorney for petitioner.)

Mr. GILLESPIE. No objection.

The MEMBER. It will be received and marked as Respondent's Exhibit S.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit S," and made a part of this record.)

By Mr. LEMING:

Q. I shew you a document, Mr. McGowan, and ask if you can identify your signature upon that?

A. Yes, sir.

Mr. LEMING (Hands papers to Counsel for Petitioner). That comes from the Department of Justice files. I might state, if your Honor please, in explanation of what we call the Department of Justice files, that at the time these transactions took place, all of these matters were within the jurisdiction of the Commissioner under the Treasury Department, and there came a time when the jurisdiction was shifted to the Department of Justice. Subsequently, and I am stating this as a matter of public notoriety and statutory enactment, there was a subsequent shifting from the Justice Department to the Bureau of Internal Revenue. In that switch, some files remained with the Department of Justice and some came to the Bureau of Internal Revenue. So this file we are referring to now contains papers that were still in the hands of the Department of Justice and were furnished to me before proceeding here, to be produced at this hearing. The document on which the witness has just identified his signature is captioned "Power of Attorney in Matters Relating to Permits and Permit Bonds." It is dated December 19, 1924. I

129 offer the document in evidence.

Mr. GILLESPIE. No objection.

The MEMBER. It will be received and marked.

The CLERK. Exhibit T.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit T," and made a part of this record.)

Mr. LEMING. This power of attorney which has just been received in evidence as Respondent's Exhibit T states in its first paragraph:



"Know all men by these presents that the undersigned, Patrick F. McGowan, Wilkes-Barre, Pennsylvania, hereinafter designated as principal, has made, constituted, and appointed William H. Gillespie, Evan C. Jones, and Harvey L. Rabbitt true and lawful attorneys of the principal."

By Mr. LEMING:

Q. Mr. McGowan, will you kindly inform the Board how you came to sign that power of attorney?

A. I was instructed by Mr. Kehoe to sign it.

Q. You did not otherwise employ these gentlemen named in the power of attorney yourself?

A. No, sir.

Q. Did you pay the gentlemen named in that power of attorney for any services performed?

A. No, sir.

Q. What other bank account, if any, was opened in your name?

A. At the West Side Trust Company.

Q. I hand you a pass book which was delivered by you to Mr. Lucas, Special Agent of the Intelligence Unit, and ask you if that is the bank account to which you have just referred?

130 A. Yes, sir.

Q. I show you another pass book, also turned over by you to Special Agent Lucas, and ask you to state what connection that has with the West Side Trust Company?

A. It is one and the same bank now.

Q. The last pass book is entitled what?

A. Kingston Bank & Trust Company.

Q. And the Kingston Bank & Trust Company, you mean to say, was merged.

A. With the Kingston Bank.

Q. You mean with the West Side Trust Company?

A. Yes.

Q. That is correct?

A. Yes, sir.

Mr. LEMING. May these two books be marked for identification?

Mr. GILLESPIE. I object, unless some connection is made.

Mr. LEMING. I have only asked that they be marked for identification.

The MEMBER. They may be marked.

The CLERK. The West Side Trust Company book is marked "Exhibit U" and the Kingston Bank & Trust Company book is marked "Exhibit V."

(The documents referred to were thereupon marked "Respondent's Exhibits U and V," for identification.)



By Mr. LEMING:

Q. Mr. McGowan, I show you a book here marked "Check Book" on the outside, being a book turned over by you to Special Agent Lucas, and ask you to state what bank that check book—to what bank that check book relates?

131 A. It relates to the \$6,000 that was deposited in the Edwardsville Bank.

Q. Which Edwardsville Bank?

A. The Peoples Bank and Edwardsville.

Q. Do you mean the Peoples National Bank?

A. At Edwardsville.

(Mr. Leming hands document to counsel for petitioner.)

By Mr. LEMING:

Q. Is that the stub book from which checks were issued on the Peoples National Bank, which you have just identified?

A. Yes, sir.

Q. Whose handwriting appears on the stubs in that book, if you know?

A. I don't know.

Q. Is it yours?

A. No, sir.

Q. I call your attention to the first stub in it; what does that first stub say?

A. It shows where there was a check for \$3,000 drawn against the \$6,000, leaving a total of \$3,000.

Q. What is the number of that check stub?

A. No. 1.

Q. Now, I call your attention to canceled Check No. 1 in evidence, as one of the checks marked Exhibit G, and ask you if you signed your name to that check?

A. Yes, sir.

Q. Now, who handed that check to you or where did you get it or how did you come to sign your name to it?

A. Mr. McHugh handed me the check.

Q. Did he write it out in your presence?

A. No, sir; I do not know—

Q. You do not recall where it was written?

A. No.

132 Q. Take Check No. 2 of Exhibit G; is that your name on it?

A. Yes, sir.

Q. And the balance of the writing on that check, is that yours?

A. No, sir.

Q. Do you know whose it is?

A. No, sir.



Q. How did you come to sign that check?

A. Mr. McHugh handed it to me to sign.

Q. I call your attention to Check No. 3 in Respondent's Exhibit G; is that your signature on that?

A. Yes, sir.

Q. Is the balance of the check in your handwriting?

A. No, sir.

Q. Do you know whose handwriting it is?

A. No, sir.

Q. How did you happen to sign it?

A. Billy McHugh gave it to me.

Q. I call your attention to Check No. 4 of Exhibit G; did you sign that one?

A. Yes, sir.

Q. Is the balance of the check in your handwriting?

A. No, sir.

Q. Do you know in whose handwriting it is?

A. No, sir.

Q. How did you happen to sign that check?

A. Mr. McHugh gave it to me.

Q. And told you to sign it?

A. Yes, sir.

133 Q. Please examine those four checks, Respondent's Exhibit G, and inform the Court whether or not you got any of the money represented by any of those checks?

A. Yes, sir.

Q. Which ones?

A. This [indicating] one.

Q. By this one you mean Check No. 3?

A. Yes, sir.

Q. For how much?

A. \$150.

Q. What was that for?

A. For my salary from February 1 until March 9.

Q. You will note what it says on the check there?

A. Yes, sir.

Q. Is that a correct notation on the check about the period the salary is for?

A. Yes, sir.

Mr. GILLESPIE. It is not correct, according to what he said before. He said February first.

Mr. LEMING. I know that, and I am trying to refresh his recollection there. The check in evidence shows on its face, "For salary from February 9 to March 9."

Mr. GILLESPIE. And the witness testified from February first.



Mr. LEMING. There is no dispute about that. The application for the permit is dated the 9th day of February 1924 and this salary check is for February 9, 1924, to March 9, 1924.

By Mr. LEMING:

Q. Have you examined each check to see whether or not you got any more of the money out of that account?

A. Yes, sir.

Q. Did you get any more?

134 A. Yes, sir.

Q. Will you inform his Honor how much and what check represents it?

A. I got \$100.

Q. What check number is that?

A. No. 4.

Q. No. 4?

A. Yes, sir.

Q. Check No. 4 which is in evidence as part of Respondent's Exhibit G is dated December 30, 1926, for \$100; what was that for?

A. That was for money that was laying over there, and I was told to go over and get it and close out the account.

Q. Money laying over there?

A. Laying in the bank.

Q. And you were told to get it and keep it?

A. Yes.

Q. Who told you to get it and keep it?

A. Mr. Kehoe.

Q. Mr. Kehoe?

A. Yes, sir.

Q. Now, does this check stub book correspond to the checks in Respondent's Exhibit G? If you will check the check numbers; please, against your stubs; just take them, one, two, three, and four; now, just take your stubs and see if they correspond?

A. Yes, sir.

Mr. LEMING. I offer the stub book in evidence.

Mr. GILLESPIE. No objection.

The MEMBER. It will be admitted.

The CLERK. Respondent's Exhibit W.

(The document referred to was received in evidence and was marked "Respondent's Exhibit W," and is made a part of this record.)

135 (Discussion off the record.)

By Mr. LEMING:

Q. Mr. McGowan, I call your attention to Respondent's Exhibit R, and to the first document in it, which is a letter dated



Edwardsville, June 12, 1926, addressed to Edgar R. Rae, Acting Prohibition Commissioner, on which you have already identified your signature; did you type that letter?

A. No, sir.

Q. Who did?

A. Mr. McHugh.

Q. Mr. McHugh?

A. Yes.

Q. I show you Respondent's Exhibit Q and that part which is a letter dated Edwardsville, February 10, 1926, addressed to F. C. Beard, Prohibition Administrator, and which you say you signed; did you type that letter?

A. No, sir.

Q. Who did, if you know?

A. Mr. McHugh.

Q. Mr. McHugh?

A. Yes.

Q. I call your attention to Respondent's Exhibits N, O, and J, and will ask you if you filled those applications out. They are all applications for renewal of permit; I will ask you if you typed them or what did you have to do with their preparation?

A. I just signed them.

Q. Did you have any financial interest in this brewery or that lease?

A. No, sir.

Q. Outside of your salary?

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A. Yes, sir.

Q. You had no financial interest in it outside of your salary?

A. No, sir.

Q. You have testified here, that one of these checks paid your salary, as shown on its face, from February 9 to March 9, 1924; was your salary subsequent to that time paid by check, and if not, how?

A. That was the first check I received, and it was the only check.

Q. You say it was the only check you ever received?

A. Yes.

Q. How was your salary paid?

A. Paid in cash.

Q. Who paid you?

A. Sometimes Mr. Kehoe and sometimes Mr. McHugh.

Q. And when you say Mr. Kehoe, you mean the Mr. Kehoe sitting at the table?

A. Mr. John Kehoe.



Q. Did your salary continue at the rate of \$150 per month?

A. No, sir.

Q. Will you explain, then, if it did not, what your salary was and about when it was changed?

A. I got \$200 after we received the permit, per month, and later on in September I got \$325 per month.

Q. What year are you talking about?

A. From the latter part of 1924.

Q. When you say after you got the permit, do you mean after the first permit was issued?

A. The first permit, in July. On July 9, I received \$200; that was after I received the permit.

137 Q. And that was in 1924?

A. Yes, sir.

Q. How long did you receive that salary per month?

A. Up until some time in the latter part of September.

Q. Of what year?

A. 1924.

Q. All right.

A. I got \$125 extra, which was \$325, to pay on an automobile which I got at that time.

Q. That was in September 1924?

A. It was around September, although I cannot recall the date.

Q. Will you state how your salary continued on through 1924 and 1925?

A. After the car was paid for I went back to \$200 a month; sometimes I got some extra money when I needed it by going up and asking for money; I used to get it sometimes.

Q. Who did you ask?

A. Mr. Kehoe.

Q. The Mr. Kehoe at the table?

A. Yes, sir.

Q. You say you got \$150 a month up to the time you got the permit?

A. Yes.

Q. What did the permit have to do with the change in your salary, if anything?

A. I don't know.

Q. What was the understanding about your salary and the amount of it at the beginning?

A. We had an understanding, Mr. Kehoe and I, that taking over the plant, if we did not get a permit, there was going to be a lot of money involved and I was satisfied to go along on \$150 up until the time we got our permit.

138 Q. Do you recall just what Mr. Kehoe said about that?

A. No; I do not.



Q. You mentioned an automobile being purchased; did you purchase an automobile?

A. No; the automobile was purchased for me.

Q. By whom?

A. Mr. McHugh came to me and said, "We are going to get you an automobile"—

Mr. GILLESPIE. I object to any conversation between him and Mr. McHugh in the absence of John Kehoe.

Mr. LEMING. We will admit that for the time being.

Mr. GILLESPIE. What did you say, Mr. Leming?

Mr. LEMING. I will agree for the time being that goes out.

Mr. GILLESPIE. All right.

By Mr. LEMING:

Q. You mentioned a while ago that when you needed some extra money you would go to Mr. Kehoe?

A. Yes, sir.

Q. Can you inform his Honor of any instance you recall in particular?

A. Yes, sir.

Q. Will you do that?

A. Mr. Kehoe sent for me—that was the time I was to get the automobile. There was some trouble at the plant which I did not know anything about, and he told me I had to go and take a trip and he said, "We are going to get you a car," and he told me to get hold of McHugh, that Billy Pool Davis would have the money for me and would go over to Billy Pool Davis at Kingston, and we went over there and Mr. McHugh paid \$600 on a Jewett roadster. The balance was \$125 a month, and the money was paid, and that is how I received my \$325 a month.

Q. Was there any other occasion when Mr. Kehoe paid you money?

A. Yes, sir. He gave me a Christmas present—I am not sure whether it was \$1,500 or \$2,000.

Q. What Christmas was that?

A. At the end of 1924.

Q. How did he give that to you?

A. In cash.

Q. Cash?

A. Yes.

Q. Do you remember anything about the denominations of the bills?

A. Yes, sir.

Q. What were they?

A. There was one thousand-dollar bill and two five-hundred-dollar bills.



Q. What did you do with the money?

A. I went about January—some time in January—I went down to Shenandoah and I paid John J. Cutt \$2,000 on my mother-in-law's home, on which he held a mortgage.

Q. Do you live on that place now?

A. Yes, sir.

Q. Does your mother-in-law live there too?

A. Yes, sir.

Q. Is the deed on record?

A. Yes, sir.

Q. Where is the place located?

A. 92 McCarragher Street, Wilkes-Barre, Pennsylvania.

Q. Wilkes-Barre, Pennsylvania?

140 A. Yes, sir.

Q. You spoke about making a trip; did you make a trip?

A. Yes; later on.

Q. Where did you go?

A. I went to New York.

Q. What did you make the trip for?

A. I really do not know, except to get away from the brewery, because they expected some trouble.

Q. What were your duties around the Brewery?

A. I did not have any duties; I could go and come as I pleased.

Q. What were you paid this salary for?

A. I guess it was just to be the permittee.

Q. Did you make more than one trip?

A. Yes, sir.

Q. What places did you go to?

A. Well, I have been in Philadelphia, in New York, Atlantic City—

Mr. GILLESPIE. I object to this. It is immaterial and irrelevant where he went. Unless there is something material in this which is to be connected up later affecting John Kehoe, I cannot see its relevancy now. It is going pretty far afield.

Mr. LEMING. I think this will show the relevancy right now.

By Mr. LEMING:

Q. When you were in New York, on one occasion did you receive this letter which I show you?

A. Yes, sir.

Q. Is that the envelope you received?

A. Yes, sir.

Q. And that other document is the letter you received in it?

141 A. Yes, sir.



Q. All of these trips you made, at whose direction were they made, or did you make them voluntarily; will you explain how they came about?

A. Some I made voluntarily and some I was instructed by Mr. Kehoe to go.

Mr. LEMING. I offer in evidence an envelope and a letter attached to it which the witness testified he received in New York. Counsel has examined the documents.

Mr. GILLESPIE. I object to the offer, if your Honor please, because in the first place there is no testimony by the witness that this is the signature of John Kehoe, the petitioner; in the second place, this is not binding upon John Kehoe merely because of the fact the witness said he received a letter through the mail from some person who signed the name of John Kehoe. Who it was is not apparent in the testimony and therefore it is not admissible as any link in any chain by which to connect this with the petitioner.

Mr. LEMING. I would like to ask counsel if he knows who signed John Kehoe's name to that.

Mr. GILLESPIE. You would like to ask what, Mr. Leming?

Mr. LEMING. Do you recognize the handwriting?

Mr. GILLESPIE. If the Court please, that is a question that is not laughable, but so serious—

Mr. LEMING. It is serious.

Mr. GILLESPIE. To ask counsel to testify against his own client on trial. I never heard of such a thing.

142 Mr. LEMING. I did not mean that. I was just trying to save time. I can take steps to prove the handwriting.

Mr. GILLESPIE. Maybe you can, but I do not know.

Mr. LEMING. At this time I do not think it is material. The witness testified that while on one of those trips he received this letter and he has produced it here and identifies it as a letter received by him in New York. Now, I am quite agreeable to this: If I do not prove the connection between this and John Kehoe, you may have your right to strike.

Mr. GILLESPIE. No; I will not agree to that. I think Mr. Leming knows, and I know that that letter is not admissible as it stands now against John Kehoe. There is merely a name attached to it—

Mr. LEMING. I am agreeable to having it marked for identification, in order to save time.

Mr. GILLESPIE. I have no objection to that, sir.

The MEMBER. It will be marked for identification.

The CLERK. Respondent's Exhibit X for identification.

(The document referred to was thereupon marked "Respondent's Exhibit X," for identification.)

Mr. GILLESPIE. Do you mind my looking at that, Mr. Leming?

Mr. LEMING. No. [Hands paper to counsel for petitioner.]



By Mr. LEMING:

Q. When you made trips at the direction of Mr. Kehoe, who paid the expenses of any such trips?

143 A. Mr. Kehoe.

Q. Was that taken out of your salary?

A. No, sir.

Q. Will you explain a little further why it was necessary for you to make trips away from the brewery?

A. That, I cannot tell.

Q. You simply did as directed?

A. Yes, sir.

Q. Now you have testified that you got the permit to operate this brewery, as I remember, about July 1st or second, 1924. Is that right?

A. Yes, sir.

Q. When did the brewery start production of beer, if you know?

A. The brewery was operating from February.

Q. 1924?

A. Yes, sir; from the time we signed the lease. We had in the brewery—there was material and beer in the brewery when we took it over from Bartel.

Q. Did you operate continuously from February up to and including the time you got your permit?

A. Yes, sir.

Q. How was the beer transported away from the brewery?

Mr. GILLESPIE. If he knows.

By Mr. LEMING:

Q. If you know.

A. Sometimes in cars and sometimes in trucks. The trucks were used for bottled beer and the cars were used for kegs.

Q. The cars were used for the kegs?

A. Yes.

Q. And by cars, you mean railroad cars?

A. Yes, sir.

144 Q. What kind of beer was the bottled beer, if you know?

Mr. WHITE. That was shipped out?

Mr. LEMING. Yes.

Mr. WHITE. If he knows.

Mr. LEMING. That is what I asked.

The WITNESS. That is what we termed near beer; that was sold locally, most of it.

By Mr. LEMING:

Q. Did you have a designation for some other kind of beer?

A. High powered beer.



Q. How was it shipped?

A. Mostly in cars.

Q. Railroad cars?

A. Yes, sir.

Q. If you know, state when the brewery started shipping the high powered beer.

A. About March 24th or 26th, 1924.

Q. What, if anything, had you to do with the shipment of beer by railroad cars?

A. I had nothing whatever to do with any class of beer. I had nothing to do with any shipments of any cars. Mr. McHugh was the manager and he handled that.

Q. Do you know who paid the freight on the shipments of beer by carload lots?

A. No; I do not.

Q. What persons were employed at the brewery other than anyone you have already mentioned?

A. There was quite a number, and some I have forgotten their names. There was Mr. McHugh, as manager; and there was Mr. Locke, who was one of the bookkeepers; Tom Kearns was a bookkeeper; and a young fellow named Kane, I think. Those were in the office. Then, in the racking room and  
145 cellars we had about 35 or 40 men, but I cannot recall their names outside of the brew master, Carl Bossert.

Q. You mentioned a name of Kane; do you remember his first name?

A. No, sir.

Q. To refresh your recollection, was it Francis Kane?

A. Yes; I think it was—I am not sure, but I know it was Kane.

Q. Do you know his relation to William F. McHugh?

A. No; I do not.

Q. What did Kane do?

A. He was in there checking up. I never paid any attention to that class of work at all, but he was in the office with Mr. Locke, Mr. McHugh, and Mr. Kearns.

Q. Now, what were Mr. Kearns' duties?

A. He was there in the office, too.

Q. Do you remember his first name?

A. Tom Kearns.

Q. Tom Kearns?

A. Yes.

Q. And you mentioned a Locke; was that Charles J. Locke?

A. Yes, sir.

Q. Do you know how many sets of books were kept?

A. No, sir.

Q. Well, did Locke keep a set of books?

A. I believe he did.



Q. Did McHugh keep a set of books?

A. I do not know.

Q. Did Locke keep account of the high power beer on his books?

146 A. I do not think so; I do not know. I would not be sure of that; I would not be sure of that because I paid very little attention to what was going on in that office.

Q. Was there any trouble in 1925 otherwise than the suit that you have already testified about, in the early part of 1925, with any of the Federal authorities, if you recall?

A. I believe there was.

Q. In the year 1925?

A. Yes, sir.

Q. Was there any trouble in the year 1926?

A. I cannot recall whether it was 1926 or 1925, but we had three Revenue men come into the plant one time, and I think their names were Timken, Staley, and Lewis. I do not remember the dates.

Q. Do you know an attorney by the name of H. D. Hirsch?

A. I have met him.

Q. Under what circumstances did you meet him?

A. I believe we were cited through an affidavit made by Timken, Staley, and Lewis, and we were ordered to Cleveland—

Q. To refresh your recollection, Mr. McGowan, I would like to ask you if the agents were not Staley and Tingall?

A. It was Timken, Staley, and Lewis.

Q. You say were cited to appear somewhere?

A. Before Pennington, in Pittsburgh.

Q. Pittsburgh, Pennsylvania?

A. Yes, sir.

Q. Did you go there?

A. Yes, sir.

Q. Did you go alone?

A. No, sir. I was instructed by Mr. Kehoe to appear in Pittsburgh on a certain date. I cannot recall it, but I can recall the circumstances around it. I left Wilkes-Barre with Tom Kehoe and Carl Bossert in a sleeper, and we arrived in Pittsburgh the next morning, and we registered in the Greater Pittsburgh—the Pittsburgher—in Pittsburgh, and the next day Mr. Kehoe made arrangements with Mr. Hirsch.

Q. Which Mr. Kehoe?

A. Tom Kehoe made arrangements with Mr. Kirsch and he introduced me to him. He had taken me over to Mr. Pennington's office and he let me stand outside for about an hour.

Q. Did you ever see this document before, Mr. McGowan?

The WITNESS. I cannot recall seeing that, Mr. Leming.



By Mr. LEMING:

Q. Your do not recall seeing the document, Mr. McGowan?

A. No, sir.

Q. I believe you have testified, Mr. McGowan, that at Pittsburgh Mr. Thomas Kehoe employed an attorney by the name of Kirsch?

A. Yes, sir.

Mr. WHITE. I do not think he said he employed him. He said he introduced him to him.

The WITNESS. That is right. I said he introduced me. I do not know anything about employing him. He just introduced me.

Mr. LEMING. That is quite all right.

By Mr. LEMING:

Q. Then, what did you say Mr. Kirsch did?

A. He took me over to Mr. Pennington's office.

Q. Who was Mr. Pennington?

A. He was Prohibition Administrator in Pittsburgh at that time.

148 Q. All right.

A. I stayed outside of the office.

Q. That is, Mr. Pennington's office?

A. Yes, sir. Mr. Kirsch came out—

Q. He first went inside?

A. Yes.

Q. And you did not go inside?

A. No, sir.

Q. All right.

A. When he came out and had taken me over to the hotel, I left him with Mr. Tom Kehoe, and I went up to my room, where I met Carl Bossert.

Q. Did you see Mr. Kirsch any more?

A. No, sir.

Q. What did you do then?

A. We hung around there until we got ready to come home. We might have gone to a show; I think we did. Mr. Bossert and I did not see Mr. Kehoe until it was time to come home.

Q. Now, did you employ Mr. Kirsch?

A. No, sir.

Q. Did you pay him for any service performed?

A. No, sir.

Q. Were the permits canceled as a result of that citation?

A. I do not recall.

Q. Did you have any conversation with Mr. John Kehoe in the latter part of 1926 about the situation there?

A. I cannot recall.



Q. Do you know a man by the name of John Carroll?

A. Yes, sir.

Q. Do you recall any conversation with Mr. John Kehoe about John Carroll?

A. Yes, sir.

149 Q. When was it?

A. That was late in—I think that was in 1926, the latter part of 1926.

Q. Where did the conversation occur?

A. At Mr. Kehoe's home.

Q. At Mr. Kehoe's home?

A. Yes, sir.

Q. You mean what Mr. Kehoe?

A. Mr. John Kehoe.

Q. John Kehoe?

A. Yes.

Q. At his home where?

A. In Pittston.

Q. Pittston, Pennsylvania?

A. Yes, sir.

Q. Will you relate to his Honor what that conversation was? What he said and what you said to him, if anything?

A. He told me we were about to lose the permit of the brewery and I was instructed that John Carroll was going to make an application for the permit and that when everything was ready Mr. McHugh would notify me and I was to turn over to Mr. Carroll all of the proceedings of that plant which, later on, on word from Mr. McHugh, I turned them over for a consideration of \$500.

Q. To whom?

A. To Mr. John Carroll. I turned them over, but I still stayed in the plant and worked on our permit up until February 28, 1927.

Q. You mentioned a consideration of \$500; what was that for?

A. That was for the material, as I understood it.

Q. Was \$500 paid to someone?

A. It was paid to me by Mr. Carroll.

Q. By John Carroll?

150 A. Yes.

Q. What did you do with the money?

A. I kept it, as I was told to do.

Q. You were told to keep it?

A. Yes, sir.

Q. Did you keep the money?

A. Yes, sir.

Q. What did you do with it?



A. I spent it, used it.

Q. And you continued to operate the brewery?

A. Yes, sir.

Q. And when you say you continued to operate the brewery, what do you mean?

A. Well, our permit was about to expire, and I believe Mr. Carroll had filed an application for a permit, and we were working on a continuance, to see if Mr. Carroll would get a permit.

Q. In what year was that?

A. That was in—

Q. Let me refresh your recollection by your permit for 1926. Now, according to these exhibits in evidence you received a permit which would expire December 31, 1926; did John Carroll have anything to do with that permit?

A. I could not recall that.

Q. This is the year 1926. What year was John Carroll applying for a permit for?

A. For the year 1927.

Mr. LEMING. 1927?

The WITNESS. Yes.

By Mr. LEMING:

Q. I show you a document which was turned over by you to Special Agent Lucas and will ask you if that was received by you?

A. Yes, that was a continuance from the prohibition administrator, to work on.

151 Q. I show you a document that you turned over to Special Agent Lucas and ask you if you received that document?

A. This is another continuance on the 1926 permit.

Mr. LEMING. I offer in evidence these two telegrams; one has a stamp date on it, in the usual manner that telegrams are dated, December 31, 1926, 12:37 p. m., and the second one, February 1, 1927, 2:53 p. m., which the witness has testified were extensions of the permit. I offer those two documents in evidence.

Mr. WHITE. You mean continuances, using the language of the witness.

Mr. LEMING. Continuances of the 1926 permit.

Mr. GILLESPIE. No objection.

The MEMBER. They will be admitted and marked as Respondent's Exhibits.

The CLERK. Exhibits Y and Z.

(The documents referred to were received in evidence, and were marked "Respondent's Exhibits Y and Z," and made a part of this record.)



By Mr. LEMING:

Q. By whom were you employed throughout the year 1926, Mr. McGowan?

A. By Mr. Kehoe.

Q. John Kehoe?

A. Yes, sir.

Q. By whom were you employed in January and February 1927?

A. By Mr. John Kehoe.

Q. And were you employed throughout the year 1926 in the capacity you have already described?

A. Yes, sir.

152 Q. And in the same capacity in the months of January and February 1927?

A. Yes, sir.

Q. Now, going back to the \$500 paid you by John Carroll, do you know when you got that \$500?

A. No; I cannot recall.

Q. Can you recall whether you got it in 1926 or 1927?

A. About the latter part of 1926.

Q. Going back, Mr. McGowan, to the time when you went to Pittsburgh in company with Mr. Tom Kehoe and Carl Bossert, I believe you testified that you stopped at the Greater Pittsburgh?

A. Yes, sir.

Q. Have you any way to refresh your recollection about that?

A. No; I have not.

Q. Were you in Pittsburgh at any time subsequent to that occasion?

A. Yes, sir.

Q. And on subsequent occasions, where did you stop?

A. At the Greater Pittsburgh.

Q. Greater Pittsburgh?

A. Yes.

Q. I do not want to press the matter too much, but I want the witness to refresh his recollection to be sure that he is right about at what hotel he stopped, not because it is of great importance, but because there are a lot of hotels and I would like to inquire again if there is any way you can refresh your recollection as to that?

A. I was only in Pittsburgh twice in my life and it was on two occasions pertaining to the brewery that I went there.

Q. Were you ever arrested, Mr. McGowan?

153 A. Yes, sir.

Q. More than once?

A. Just once.



Q. Just once?

A. Yes, sir.

Q. When was that?

A. That was around June 3rd—I cannot recall. I was arrested by Mr. Stone, a Department of Justice officer.

The MEMBER. Will you speak louder?

The WITNESS. I was arrested by Mr. Stone in my home. I think it was some time in June 1926, but I am not sure of the year, but it was about 1926.

By Mr. LEMING:

Q. To refresh your recollection, was it not 1927?

A. Yes; it was 1927; June 3rd, 1927.

Q. Did your arrest grow out of the operation of the Bartel Brewery?

A. Yes, sir.

Q. You were indicted, as a matter of fact, for conspiracy, along with a number of other persons?

A. Yes, sir.

Q. In the United States District Court at Cleveland, Ohio?

A. Yes, sir.

Q. Now, when you were arrested at your home in June 1927, will you just inform his Honor what took place at that particular time?

A. Yes, sir. About 8 o'clock in the morning I was upstairs, when Mr. Stone and a marshal from the Marshal's office in Scranton, Gould, I think it was, came into my home and wanted to see me, and I came downstairs and I was placed under arrest. They were taking me to Scranton. I tried to dress, and they partly followed me upstairs. I wanted to telephone, but they would not let me. So I happened to get a chance to speak to my wife, and I told her—

(Whereupon, at 5:30 o'clock p. m., the hearing was adjourned until tomorrow, Tuesday, August 21, 1934, at 9:30 o'clock a. m.)

Hearing at Scranton, Pennsylvania, on the 21st day of August 1934, at 9:30 o'clock a. m.

PATRICK F. MCGOWAN, the witness on the stand at the time of taking the adjournment, resumed the stand and testified further as follows:

Direct examination (continued) by Mr. LEMING:

Q. Mr. McGowan, I had asked you, just before the adjournment last night, about your arrest, and you had said they were taking you to Scranton; were you taken to Scranton?

A. Yes, sir.

Q. Where were you taken in Scranton?



A. To the Marshal's Office in Scranton.

Q. In the Federal Building at Scranton?

A. Yes, sir.

Q. Who did you see and what happened when you arrived there?

A. I met Mr. William F. McHugh and Mr. Abe Salsburg.

Q. Who was Mr. Salsburg?

A. He is an attorney at Wilkes-Barre, Pennsylvania.

Q. Were there any other persons there?

A. Not to my knowledge.

Q. Well, were you released from custody?

A. Yes.

155 Q. Did you give bail?

A. Yes.

Q. And how was the bail provided?

A. I talked to Mr. Salsburg and Mr. William F. McHugh, and Mr. Salsburg had taken care of my bail and Mr. McHugh's bail with an agent of the American Surety Company.

Q. Was the agent of the American Surety Company there?

A. I did not talk to him; I do not know.

Q. What next happened?

A. After I was released, I left with Mr. Abe Salsburg, as I had no car, and I came to Pittston, Pennsylvania, and went up into Mr. Kehoe's office.

Q. Which Kehoe?

A. Mr. John Kehoe. I met Mr. Kehoe with Mr. Salsburg and Mr. Kehoe asked me if everything was all right, and I said yes. Mr. Salsburg went into Mr. Kehoe's office and I stood out in the hall, and I got tired waiting and I took the Laurel Line home, because I knew they were very anxious to hear what had happened to me.

Q. You say they were anxious to hear; who do you mean?

A. My wife and family.

Q. Where was your residence at that time?

A. 92 McCarragher Street, Wilkes-Barre, Pennsylvania.

Q. Did you pay a premium on the bond with the Surety Company?

A. No, sir.

Q. Did you put up any collateral with the Surety Company for going on your bond?

A. No, sir.

Q. Did you employ Mr. Salsburg to represent you at that time?

156 A. No, sir.

Q. Did you pay him for any service rendered for or on behalf of yourself?

A. No, sir.



Q. I call your attention, Mr. McGowan, to Respondent's Exhibit P, and to that part of it which is a surety bond, on which you have identified your signature and which is also signed by the American Surety Company, of New York, the amount of the bond being \$25,000; did you put up any collateral with the American Surety Company as a condition to their making that bond? The question is, did you put up any collateral?

A. No.

Q. Did you at any time pay a premium on that bond to the American Surety Company?

A. No.

Q. Or to any other person?

A. No.

Q. After the lease for the brewery premises had been entered into February 9, 1924, were there any other leases or modification of that lease entered into in respect of any of the brewery property?

A. Yes.

Q. Who made the arrangements for any supplementary agreements or supplementary leases in respect of the property?

A. I do not know.

Q. I show you a document and ask you if you recognize your signature on that?

A. Yes.

(Mr. Leming hands paper to counsel for petitioner.)

Mr. LEMING. While counsel is examining that, I will show you another document and ask you if you can identify your signature on that?

157 The WITNESS. Yes.

(Mr. Leming hands paper to counsel for petitioner.)

Mr. LEMING. Here is still another document. Please examine it and state if you can identify your signature on it.

The WITNESS. Yes.

Mr. LEMING. I wonder if counsel would mind letting me have these immediately so we will not slow up the proceeding, and they can have them later to make any copies that they like.

I offer in evidence the document identified by the witness as bearing his signature, the first one identified.

The MEMBER. Any objection?

Mr. GILLESPIE. No objection, your Honor.

The MEMBER. It will be admitted and marked as Respondent's next exhibit.

The CLERK. AA.

(The document referred to was received in evidence and was marked "Respondent's Exhibit AA" and is made a part of this record.)



Mr. LEMING. I offer in evidence the second document just identified by the witness as bearing his signature.

Mr. GILLESPIE. No objection, your Honor.

The MEMBER. It will be admitted and marked as "Respondent's Exhibit BB."

(The document referred to was received in evidence and was marked "Respondent's Exhibit BB," and is made a part of this record.)

Mr. LEMING. I offer in evidence the third document just identified by the witness as bearing his signature.

Mr. GILLESPIE. No objection.

The MEMBER. It will be received and marked.

The CLERK. Exhibit CC.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit CC," and is made a part of this record.)

The MEMBER. What are these three documents, Mr. Leming?

Mr. LEMING. I will be glad to explain that to your Honor.

The MEMBER. I would like the record to show.

Mr. LEMING. The document offered and received in evidence as "Respondent's AA" reads as follows:

*Exhibit AA*

"For value received it is hereby agreed that the next lease between the Bartel Brewery Company of Edwardsville, Pennsylvania, lessor, and Patrick F. McGowan, of Wilkes-Barre, Pennsylvania, lessee, dated February 9, 1924, shall include and cover the blacksmith and carpenter shops and ice-making plant therein referred to and not thereby leased from July 1, 1925, to the end of the further term therein provided, namely, December 31, 1926, for the additional rent of \$6,000 per year, payable in equal monthly installments, in advance, of \$500, the same being in addition to the rent specified in the said lease during such further term, subject to all the terms and conditions of the said lease as hereby modified, and the lessee hereby agrees to pay the lessor the said additional rent of \$500 a month as hereinabove specified.

159 "Witness the hands and seals of the parties hereto, the said lessor and lessee, this First day of July 1925.

"Bartel Brewing Company, by F. L. Shott, President.

"Patrick F. McGowan.

"In the presence of E. McCray and William F. McHugh."

The document offered in evidence as Respondent's Exhibit BB dated October 30, 1924, reads as follows:



Exhibit BB

"THE BARTEL BREWING COMPANY,  
Edwardsville, Pennsylvania.

"GENTLEMEN: You are hereby notified that I exercise my option for a further term of two years as provided in the lease between you and me dated February 9, 1924.

"Yours very truly,

"Witness:

"PATRICK F. MCGOWAN.

"WILLIAM F. McHUGH."

The document offered and received in evidence as Respondent's Exhibit CC dated February 29, 1924, reads:

EXHIBIT CC

"THE BARTEL BREWING COMPANY,

"Kingston, Pennsylvania.

"GENTLEMEN: Confirming our recent verbal arrangement, I desire to say that any of your property not leased or sold to me now in or upon the premises in Edwardsville, Pennsylvania, demised to me by Lease from you dated February 9, 1924, may be left by you without charge in and upon the said demised premises until removed or otherwise disposed of by you.

"Yours very truly,

"PATRICK F. MCGOWAN."

160 Mr. WHITE. Would you mind indicating on the record the source of these documents, Mr. Leming?

Mr. LEMING. The source of these documents is from the Office of the United States Attorney at Cleveland, Ohio, and according to the record there, were produced before a grand jury, and they bear already, as you will note, certain Government exhibit numbers.

By Mr. LEMING:

Q. Now, Mr. McGowan, referring to Respondent's Exhibit AA, will you refresh your recollection by reading that and state how that came to be executed, if you know?

A. Yes. At that time, February 9, 1924, we had no jurisdiction over the ice plant, the blacksmith shop, and the carpenter shop.

Q. By jurisdiction you mean the lease of February 9, 1924; did you include those items?

A. No, sir.

Q. That is, the lease did not include those items.

A. No, sir.



Q. Well, now, what step did you take to have them included?

A. I did not take any steps.

Q. How did you come to sign that document you have in your hand, Respondent's Exhibit AA?

A. I was instructed to sign it by William F. McHugh.

Q. What, if anything, did you have to do in negotiating that supplemental agreement you have in your hand?

Mr. GILLESPIE. He has already answered, I believe.

The WITNESS. I had nothing to do with it.

161

By Mr. LEMING:

Q. Were you present at any negotiations which were had?

A. No, sir.

Q. Where was this document, Respondent's Exhibit AA, prepared, if you know?

A. I do not know.

Q. I call your attention to Respondent's Exhibit BB and ask you to state, if you know, who prepared that document?

A. I do not know.

Q. How did you come to sign it?

A. Mr. McHugh handed it to me and I signed it.

Q. I call your attention to Respondent's Exhibit CC which has been offered and received in evidence and I will ask you to state if you prepared that document?

A. No, sir.

Q. I call your attention to the fact that this document you have just had in your hand, Respondent's Exhibit CC, starts out by saying, "Confirming our recent verbal arrangement"; what was that verbal arrangement?

A. I do not know.

Q. Well, did you have any verbal arrangement with anyone?

A. No, sir.

Q. Do you know at what place this letter was written?

A. No, sir.

Q. Do you know where it was tendered to you to be signed?

A. Yes, sir.

Q. Where?

A. At the P. F. McGowan Brewery, in the office of Mr. McHugh.

162 Q. I call your attention to Respondent's Exhibit BB and ask you where that was tendered to you to be signed, if you know or remember?

A. In the office of Mr. McHugh.

Q. Where?

A. In the P. F. McGowan Brewery at Edwardsville, Pennsylvania.



Q. And when you say the P. F. McGowan Brewery, is that the same as is sometimes called Bartel's Brewery?

A. Yes, sir.

Q. Of Edwardsville, Pennsylvania?

A. Yes, sir.

Q. Now, please examine Respondent's Exhibit AA on which you have identified your signature and on which the signature of Mr. Shott appears, or at least, a signature in that name; where did you sign that, if you remember?

A. In Mr. McHugh's office.

Mr. GILLESPIE. In Mr. McHugh's office?

The WITNESS, Yes.

By Mr. LEMING:

Q. Where?

A. At the P. F. McGowan Brewery.

Q. Of Edwardsville?

A. Edwardsville, Pennsylvania.

Q. Now, when you say Mr. McHugh's office, what kind of an office did he have?

A. Well, he had a very small office. That was entirely kept by himself.

Q. What part of the brewery was it located in?

A. In the bottling department.

Q. In the bottling department?

A. Yes.

Q. Which side of the brewery was that on?

A. That was on the right side of the brewery.

163 The brewery was on one side and the bottling plant was on the other, with a driveway between the brewery and the bottling plant.

Q. Were there any other offices at the Brewery?

A. Yes, sir.

Q. Whose?

A. Mr. Shott's.

Q. And where was it located?

A. In the bottling plant, on the right side of the brewery.

Q. On the same side of the brewery that McHugh's office was on?

A. Yes.

Q. Were there any other offices in the brewery?

A. No, sir.

Q. I think you mentioned that Mr. Locke was a bookkeeper?

A. Yes.

Q. Where was his office?

A. His office was in connection with Mr. McHugh's, with a door separating them.



Q. On the same floor, I assume, of the brewery?

A. Yes, sir.

Q. Was that the first or second floor of the brewery?

A. Mr. Locke's office was on the bottom floor and there was a little offset, where you went up a pair of steps, and that is where Mr. McHugh's office was.

Q. And that was closed off from the bookkeeping office?

A. Yes, sir.

Q. Now, was there any other office in connection with those same two rooms?

A. No, sir.

Q. Who occupied the office where Locke the bookkeeper stayed?

164 A. Mr. Kearns, Mr. Tom Kearns, and a boy by the name of Kane.

Q. Francis Kane?

A. I believe so; yes.

Q. Do you know where Francis Kane is now?

A. No, sir.

Q. Who occupied the office in which Mr. McHugh stayed, aside from himself?

A. Just Mr. McHugh.

Q. Did you ever see John Kehoe about the brewery?

A. Once.

Q. Do you remember what occasion that was?

A. I just do not know the exact date, but I believe it was the night of the Dempsey-Tunney fight in Philadelphia.

Q. Did you ever see Tom Kehoe around the brewery?

A. Yes, sir.

Q. How many times did you see him there?

A. About twice a week, or maybe three times; some weeks less and some weeks more.

Q. Do you know where John Kehoe's office is located or was located in the year 1925?

A. Yes, sir.

Q. Where?

A. Pittston, Pennsylvania.

Q. Were you ever in his office?

A. Yes, sir.

Q. What was your custom, if any, about going to his office?

A. To talk to him about the brewery and conditions surrounding it and to talk about myself sometimes, and sometimes to go up to get my pay.

Q. How often did you go to his office?

165 A. I could not tell that. I used to go—sometimes I was there three times a week, and sometimes I would not be



there for a week; it would just depend on the conditions under which I went there.

Q. Did you go there voluntarily, or were you called there, or how did you happen to go there?

A. I sometimes went voluntarily and sometimes I was called there.

Q. Did you sign any papers in that office?

A. No, sir.

Q. How far is it from the brewery to the place where Mr. Kehoe's office is, John Kehoe's?

A. I do not know the exact mileage; I could not tell that; maybe three miles and maybe four; I could not tell the exact distance between them, but I cover the distance in 20 minutes.

Q. That is, from the brewery to his office?

A. Yes, sir.

Q. Who are some of the people you have seen in his office on these several occasions?

A. I have met Mr. Tom Kehoe there; I have met William F. McHugh there; I have met Abe Salsburg there; I have met Tom Kearns there; and I have met his secretary there.

Q. Whose secretary?

A. Mr. Kehoe's secretary.

Q. And when you say Kehoe you mean—

A. John Kehoe.

Q. Do you know W. B. Loughran?

A. Yes, sir.

Q. Did you ever see him at the brewery?

A. Yes, sir.

Q. Did you ever see him at Kehoe's office?

A. No, sir.

Q. How often did you see him at the brewery?

A. On several occasions.

Q. What would he do there, if you know?

166 A. I do not know. He would come there and talk to Mr. William McHugh and he would talk to Tom Kehoe, Carl Bossert, and he drank beer up in Mr. Bossert's office with me several times.

Q. You mean Loughran did?

A. Yes.

Q. Mr. McGowan, did John Kehoe ever instruct you or tell you how to deport yourself in conversation or otherwise in respect to the brewery?

A. Yes, sir.

Q. What did he say to you?

A. He told me always to keep my mouth shut and talk to nobody concerning the plant.



Q. Did you ever meet any prohibition agents there?

A. No, sir.

Q. At the brewery?

A. No, sir.

Q. Did you have occasion to meet any prohibition agents there in the year 1924?

A. No, sir.

Mr. GILLESPIE. Where?

Mr. LEMING. At the brewery.

By Mr. LEMING:

Q. Going back, Mr. McGowan, to the time of your arrest and your release under bond, were you afterwards tried in court under that arrest?

A. Yes, sir.

Q. Where?

A. Before the Court of Appeals in Philadelphia.

Q. Did you appear in the United States District Court for the Middle District of Pennsylvania at Scranton—I will withdraw that question. To refresh your recollection, Mr. McGowan, I will ask you if this is not a fact: That you appeared in court under a removal proceeding?

167 A. Yes, sir.

Q. And is that what you had in mind when you said you were tried?

A. Yes, sir.

Q. Now, as a matter of fact you were not removed, were you?

A. No, sir.

Q. And you did not stand trial, did you?

A. No, sir.

Q. And you were never convicted?

A. No, sir.

Q. And you were dismissed?

A. Yes, sir.

Q. Now, I call your attention to Volume 25 of the Federal Reporter, Second Series, page 941, and to the names of the attorneys for the appellants in that case, namely, Knapp, O'Malley, Hill, and Harris; Stanley M. Evans, John M. Gunster, C. P. O'Malley, Vandling D. Rose, Paul G. Collins, M. J. Martin, and Clarence Ballantine, all of Scranton, Pennsylvania, and Abram Salsburg, of Wilkes-Barre, Pennsylvania; I will ask you, Mr. McGowan, if you employed any of the attorneys named to represent you in that removal proceeding?

A. No, sir.



Q. Did you pay any of them for representing you?

A. So I get myself clear on this, I had paid an attorney, but I do not know whether it was for that case or whether it was for the Cleveland case.

Q. I show you a document that was delivered by you to Special Agent Lucas and ask you if that refreshes your recollection?

A. It does.

(Mr. Leming hands paper to counsel for petitioner.)

168 Mr. LEMING. Counsel has examined the document.

By Mr. LEMING:

Q. Now, I will ask you whether or not you paid any attorney representing you in any of the proceedings which have been mentioned in your testimony up to this time?

A. No. The only money that I ever paid was this receipt [indicating].

Q. What money did you pay?

A. I paid \$1,000 to Frank M. Martin, in the office of M. J. Martin, attor. at Scranton, Pennsylvania.

Q. Do you mean Frank M. Martin or Frank L. Martin?

A. Frank L. or F. M., I am not sure.

Q. Now, you say you paid it; where did you get the money?

A. I was called to Mr. Kehoe's office in Pittston, and there I met William F. McHugh, and he and I went to the office of F. L. Martin and M. J. Martin, and in the presence of Mr. Martin Mr. McHugh turned over to me \$1,000, and I turned it over to F. L. Martin and got a receipt.

Q. Where is that receipt; is that the document you were just looking at?

A. Yes, sir.

Q. Is that all you know about the source of that \$1,000?

A. Yes, sir.

Q. Was that \$1,000 taken out of your salary?

A. No, sir.

Q. Did you ever repay that \$1,000 to anyone?

A. No, sir.

Q. Did you ever give a note or promise to repay that \$1,000 to anyone?

169 A. No, sir.

Q. Do you know what proceeding that \$1,000 applied to, which was paid to Frank L. Martin?

A. No, sir.

Mr. LEMING. I offer the receipt in evidence.

Mr. GILLESPIE. No objection.

The MEMBER. It will be admitted and marked.



The CLERK. Exhibit DD.

(The document referred to was received in evidence and was marked "Respondent's Exhibit DD," and made a part of this record.)

By Mr. LEMING:

Q. Did you go on that occasion directly from Mr. Kehoe's office to Mr. Martin's office?

A. Yes, sir.

Q. Where is Mr. Martin's office located in Scranton, or where was it located at that time?

A. I cannot recall that; I was never there before or after.

Q. Can you inform his Honor of any other payments to any other attorney of which you have knowledge?

A. No, sir.

Q. That is in connection with any of the proceedings mentioned in your testimony up to this time?

A. No, sir.

Q. Will you inform his Honor how you first met John Kehoe?

A. Yes. In the year of 1923 I was introduced to Mr. John Kehoe through an attorney by the name of James McQuade, of Wilkes-Barre, Pennsylvania.

Q. How did he happen to introduce you to Mr. Kehoe?

A. Mr. McQuade came to me, and we talked over—

Q. Can you limit your testimony to what Mr. McQuade said to you in the presence of John Kehoe?

A. Yes. Mr. McQuade and Mr. Kehoe were dickering with Mr. Shott to take—

Mr. GILESPIE. May I interrupt the witness, your Honor? I respectfully submit that is not a responsive answer to the question. That does not say who spoke or who spoke to whom, he is giving a general recital of something that happened somewhere—

By Mr. LEMING:

Q. Limit your answer, Mr. McGowan, to what was said on this occasion when Mr. McQuade introduced you to John Kehoe.

Q. You say McQuade introduced you to John Kehoe?

A. Yes.

Q. What did Mr. McQuade say, if anything?

A. He said, "Here is the man I would like to introduce you to, who could handle this brewery proposition."

Q. What did John Kehoe say?

A. Mr. Kehoe said, "I will think it over."

Q. Was there anything else said at that time by either one of them if you recall?



A. No; only that McQuade and Mr. Kehoe talked about things which I cannot recall. That was my first introduction to Mr. Kehoe at that time.

Q. It is my recollection, Mr. McGowan, that I asked you yesterday about when you first met John Kehoe, and I think your answer was 1922.

A. I knew him in 1922, but I was never introduced to him until 1923. The first introduction that I had to Mr. Kehoe was in 1923, through one James McQuade, but I knew Mr. Kehoe in 1922.

Q. Well, is John Kehoe quite well known in that country?

A. Yes, sir.

Q. Did you on any subsequent occasion have a conversation at which John Kehoe and James McQuade were both present?

A. Outside of the day that Mr. McQuade introduced me to Mr. Kehoe, that was the only occasion on which I ever met Mr. Kehoe with Mr. McQuade.

Q. Under what circumstances did you next meet John Kehoe?

A. When Mr. Kehoe sent for me to go down, in the presence of William F. McHugh, to sign the lease.

Q. Well, had there been any previous conversation between you and Mr. Kehoe before you went down to sign the lease?

A. Yes.

Q. Where?

A. Once at Williamsport, Pennsylvania—a telephone conversation between Mr. Kehoe and I when I was with the Wilkes-Barre Ball Club, and several times after; but I never talked to him personally; it was over the telephone.

Q. At whose office or at what point was the matter of salary discussed?

A. At Mr. Kehoe's office.

Q. Was that before or after the lease was signed?

A. That was before. That was about some time in January, 1923.

Q. Did you mean 1923 or 1924?

A. 1923.

Q. Well, the lease was not executed until February 9, 1924?

172 A. Yes, sir.

Q. Does that refresh your recollection any as to the time of your conversation about the salary?

A. The lease was signed in February and I started to work for Mr. Kehoe on February 1, 1924. The lease was signed on February 9, 1924.



Q. Did you have any conversation with John Kehoe after that first meeting between Mr. Kehoe and Mr. McQuade?

A. Yes.

Q. About McQuade?

A. Yes.

Q. Well, what was said, if anything, by Mr. Kehoe about McQuade?

A. Mr. Kehoe had called me to his office in Pittston, Pennsylvania, and he instructed me to say nothing to James F. McQuade, and if they asked me anything pertaining to the brewery, I was to tell him that John Kehoe had nothing to do with it; that my cousin, Con Dorian was interested in it, which I did.

Q. How do you spell that name?

A. D-o-r-i-a-n.

Q. Was that conversation after the lease had been entered into?

A. Yes.

Q. Between you and Mr. Shott?

A. Yes, sir.

Q. I show you a document which was turned over by you to Special Agent Lucas and will ask you to state under what circumstances that was received by you; may I have it just a minute before you answer so counsel may see it?

(Mr. Leming hands paper to counsel for petitioner.)

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By Mr. LEMING:

Q. Counsel has examined the document, and I will ask you to state under what circumstances you received it?

A. I received this after I was instructed that John F. Carroll—

Mr. GILLESPIE. Just a minute, if the Court please. If he is going to retail some instructions from someone in the absence of Mr. Kehoe, I object; Mr. Kehoe should either be present or have knowledge of it in order to make it competent.

By Mr. LEMING:

Q. Mr. McGowan, to refresh your recollection; I will ask you when your connection with the brewery ceased?

A. February 28, 1927.

Q. What happened right about that time?

A. I was called to Mr. Kehoe's office previous to February 28, 1927, and I was notified by Mr. John Kehoe that it was impossible to get a permit for John Carroll, who had made an application, and I was instructed to sign a letter which was given to me by William F. McHugh, notifying the Prohibition Department in Philadelphia to come on and dispose of the beer which we had at that time. The Prohibition Department came



in on February 28, 1927, and disposed of either 885 or 895 barrels of high-test beer, and I cannot recall on the one-half of one per cent. I got a receipt from the Federal Department in Philadelphia.

Q. What is that in your hand?

A. This is the receipt.

(Mr. Leming hands paper to counsel for petitioner.)

174 Mr. LEMING. If there is any objection to it, I will withdraw the offer because the witness has testified to what occurred.

Mr. GILLESPIE. I think that is not—

Mr. LEMING. I say if you have any objection at all it will be withdrawn.

Mr. GILLESPIE. I do object. I do not think it is competent or material here at this time.

The MEMBER. The offer is withdrawn.

By Mr. LEMING:

Q. Did you know George Buss?

A. Yes, sir.

Q. Did you ever see him around the brewery?

A. Yes, sir.

Q. Did you ever have any conversation with Kehoe about him?

A. Yes, sir.

Q. What was it; what did Kehoe say to you?

A. Sometime in May 1924, Mr. Buss came to the Brewery. I talked to Mr. Buss and associated with him. I did not know what his business was, so I went up to see Mr. Kehoe why George Buss was at the brewery. Mr. Kehoe told me that George Buss was all right, to never mind.

Q. What office position, if any, did George Buss hold at that time, if you know?

A. I do not think he had any, from what I know.

Q. Did you say why you went to Mr. Kehoe and had that conversation about Mr. Buss?

A. Yes; I did.

Mr. LEMING. All right. Now, did that conversation occur before or after you had given the letter to Buss that has been offered in evidence?

The WITNESS. That was before.

By Mr. LEMING:

175 Q. You mean the conversation was before?

A. Before I got the letter—before Mr. Buss got the letter granting him power of attorney; that was before.

Q. Do you know, of your own personal knowledge, what was done with the mash at the brewery?



A. Yes.

Q. Well, please state what, if you know, was done with it?

A. Some of the mash was taken from the brewery by a trucker by the name of O'Neill and was disposed of at Mr. Kehoe's home in Harding, Pennsylvania.

Q. How do you know that?

A. Because I have seen it go there; I have seen it leave the brewery with Mr. O'Neill and enter Mr. Kehoe's home in Harding, Pennsylvania.

Q. Were there any dogs kept at the brewery?

A. Yes, sir.

Q. What kind of dogs?

A. Police dogs.

Mr. GILLESPIE. Now, if your Honor please, I must object to that. I see no materiality in such a question.

Mr. LEMING. We will show the materiality.

The MEMBER. The objection is overruled.

By Mr. LEMING:

Q. Whose dogs were they, if you know?

A. Well, I really could not testify whose dogs they were.

Q. If you do not know, that is your answer. Your answer is you do not know?

A. I do not know.

Q. Were you familiar with any of those dogs by sight?

176 A. Yes, sir.

Q. Did you see the same dogs at any other place after the brewery ceased operation?

A. I cannot testify to that, because police dogs or German shepherds look very much alike and I could not tell whether I had seen them after they left the brewery.

By Mr. LEMING:

Q. Did the brewery operate throughout the year 1925; that is, during the entire year 1925?

A. I believe it did.

Q. Were you employed there under the circumstances you have already described throughout the year 1925?

A. Yes, sir.

Q. Mr. McGowan, did you ever make a statement to an official of the Bureau of Internal Revenue about what you knew concerning the operations of Bartel's or McGowan's brewery, a voluntary statement?

Mr. GILLESPIE. We object as immaterial and irrelevant, any statement made by him to the Internal Revenue Department.

Mr. LEMING. I did not ask him what he said, but did he make a statement.



Mr. GILLESPIE. It will be followed up with the statement.  
The MEMBER. We will see whether it is followed up. Objection is overruled.

Mr. GILLESPIE. Exception.

The MEMBER. Exception will be noted.

(To the witness.) You may answer.

The WITNESS. Yes.

By Mr. LEMING:

177 Q. When did you make your first statement; when was the first statement made by you to an official of the Bureau of Internal Revenue?

A. About June 2nd or 3rd, 1929.

Q. Where was that?

A. In Mr. Ireys office in Washington, D. C.

Q. Who was present at the time you made the statement?

A. Mr. Fox or Cox; I can not recall.

Q. A Government officer?

A. Yes; and Mr. Lynn.

Q. What are his initials?

A. Mr. John or Jack Lynn.

Q. Was he a Government officer?

A. No, sir.

Q. All right.

A. And Paul Jones of Kingston, Pennsylvania.

Q. Any others present?

A. I believe a Government officer by the name of Malone.

Q. Did you say George Murdock was there?

A. No, sir.

Q. He was not there at the time?

A. No, sir.

Q. Did you ever file a claim for a reward for furnishing that information?

A. No, sir.

Q. Has your attorney filed one for you?

A. Yes, sir.

Q. Do you know when that claim was filed by your attorney, if you know?

A. It was sometime later, some several months later. It was several months later I got a letter from Mr. Murdock stating that he was going to file a claim.

Q. Has any Government officer at any time promised you a reward?

A. No, sir.

178 Q. Have you had any assurance at any time that you would ever receive any award or reward?

A. No.



Q. Has all of that matter of an award been handled by your attorney?

A. Yes, sir.

Q. And your attorney was who?

A. George Murdock of the office of Murdock, Stone and Lewis of Chicago, Illinois.

Mr. LEMING. Take the witness.

Mr. LEMING. Counsel has asked me to produce the certified copy of McGowan's return, and that suggests to me I intended to ask the witness about it, so by agreement, I will now ask it, so that you will have it in the record available.

By Mr. LEMING:

Q. Mr. McGowan, I show you three documents, and they are captioned individual income-tax return for the calendar year 1924, and individual income-tax return for the calendar year 1925, and another form, individual income-tax return for the calendar year 1926. These are documents turned over by you to Mr. Lucas, who has had them in his custody. Are those the retained copies of income-tax returns made for you in those years?

A. Yes.

Q. Did you make them up?

A. No.

Q. Did you furnish the information which went in them?

A. No.

Q. I show you another document here entitled, "Individual Income Tax Return for calendar year 1925," and will ask you if that is your signature on it? I would like to make this statement about this return. Prior to leaving Washington

179 I had caused a search to be made for the original return of Patrick F. McGowan for the years 1924, 1925, and 1926, and in response to the search the only original return in the Bureau is the one for the year 1926. I was informed that the record showed all returns filed by individuals had been destroyed pursuant to the authority the Commissioner has to destroy records after a certain date. I make that statement so counsel understands about the response to the subpoena.

A. Yes.

Q. You signed this return for the year 1926?

A. Yes.

Mr. LEMING. I invite your attention to the fact that the witness has identified the original return for 1926 which is from the Bureau files, and it came to me in response to that search. I offer the retained copies for 1924, 1925, and 1926, and the original return for 1926 in evidence.

Mr. GILLESPIE. No objection.



The MEMBER. They will be admitted and marked "Respondent's Exhibits."

The CLERK. The 1924 return is marked "Respondent's Exhibit EE," 1925 return "Respondent's Exhibit FF," the original 1926 return "Respondent's Exhibit GG," and the retained copy "Respondent's Exhibit HH."

(The documents referred to were received in evidence and marked, respectively, "Respondent's Exhibits EE, FF, GG, and HH," and made a part of this record.)

By Mr. LEMING:

Q. Mr. McGowan, calling your attention to Respondent's Exhibits EE, FF, GG, and HH, you will note that each one of them shows a loss. Do you know as a fact whether or not a loss was sustained in each of those years in the operation of that brewery?

A. I don't know.

Q. And why do you not know?

A. Because I had nothing to say in regard to the management of that plant.

Mr. LEMING. You may take the witness.

(Thereupon the witness P. F. McGowan was temporarily excused from the stand.)

Whereupon HAROLD TIPPETT was called as a witness for and on behalf of the respondent and, having first been duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mr. Tippet, you are responding here today to a subpoena directed to the Kingston Bank and Trust Company?

A. I am.

Q. Do you have a copy of that subpoena?

A. I have it in my brief bag. [Producing paper.]

Q. You was subpoenaed to produce the ledger sheets of the West Side Trust Company showing the account of P. F. McGowan from 1924 to 1927, inclusive, also ledger sheets of the Kingston Bank and Trust Company showing the account of P. F. McGowan for 1928? Will you produce those records?

A. Yes. [Producing papers.]

Q. You were to produce signature card or cards filed with the West Side Trust Company in connection with the account of P. F. McGowan, and also signature cards filed with the Kingston Bank and Trust Company in connection with the account of P. F. McGowan. Have you produced those?



A. This is the signature card of the West Side Trust Company, now merged into the Kingston Bank and Trust Company, so no new signature card was taken.

Q. So this is the only card?

A. This is the only card.

Q. You were asked to produce all deposit slips of deposits made in the account of P. F. McGowan in the West Side Trust Company, also all deposit slips of deposits made in the Kingston Bank and Trust Company. Have you produced those?

A. Yes; these are the deposit slips.

Q. You were also subpoenaed to produce cancelled checks on the account of P. F. McGowan in the West Side Trust Company and the Kingston Bank Trust Company. Have you produced those?

A. Those are the only not surrendered. I will explain this, that there is one deposit slip, the last one we have not been able to locate. All the others I am sure are there.

Q. You mean the deposit tickets you have produced are complete with one exception?

A. I think so.

Q. How do you account for the fact there was one other deposit ticket?

A. The last deposit on the West Side, I think that is the one we have not been able to locate. Looking hurriedly I could not find it.

Q. And what is the date of that deposit, Mr. Tippet?

A. March 7, 1927.

182. Q. What is the amount of it?

A. \$2,500.

Q. And that appears on the ledger sheet?

A. On the ledger sheet.

Q. And that is the deposit slip you were unable to find?

A. That is the one that is missing.

Mr. LEMING. I would like to have these documents marked in order for identification. The first are the ledger sheets. There are eight sheets; is that right, Mr. Tippet?

The WITNESS. That is correct.

Mr. LEMING. They may be marked as one exhibit for identification.

The CLERK. Exhibit II for identification.

(The documents referred to were thereupon marked "Respondent's Exhibits II" for identification.)

Mr. LEMING. The signature card we will have marked as the next number for identification.

The CLERK. Exhibit JJ for identification.

(The document referred to was thereupon marked "Respondent's Exhibit JJ" for identification.)



Mr. LEMING. And the deposit slips for identification the next number.

The CLERK. KK for identification.

-(The documents referred to were thereupon marked "Respondent's Exhibit KK" for identification.)

Mr. LEMING. And the two cancelled checks is the next item for identification.

The CLERK. LL for identification.

183 (The documents referred to were thereupon marked "Respondent's Exhibit LL" for identification.)

By Mr. LEMING:

Q. Now, these records you have produced in response to the subpoena are the only records the bank has in respect of an account of P. F. McGowan?

A. Yes, sir.

Q. With the exception of the missing deposit slip?

A. Yes, sir.

Q. Do you know P. F. McGowan?

A. I did not know him until somebody pointed him out to me.

Q. On the witness stand?

A. Yes, sir.

Q. How long have you been connected with that bank?

A. Since late in 1924.

Q. Were you connected with the West Side Trust Company in 1924?

A. Late in 1924.

Q. And continuously since that time?

A. Yes, sir.

Q. But you did not know Mr. McGowan until he was identified to you on the witness stand?

A. No, sir.

Q. Did you know William F. McHugh?

A. Yes, sir.

Q. Did you ever cash a check for him at the Bank?

A. No; I did not do teller duty at the bank.

Mr. LEMING. You may take the witness.

Mr. GILLESPIE. No questions.

Mr. LEMING. That is all Mr. Tippet.

(Witness excused.)

184 Thereupon, P. F. McGowan was called to the stand, and was further examined and testified as follows:

Direct examination (continued) by Mr. LEMING:

Q. Mr. McGowan, you have previously identified a pass book of the West Side Trust Company of Kingston, Pennsylvania,



which has been marked for identification "Respondent's Exhibit U." You also identified a pass book of the Kingston Bank and Trust Company, Kingston, Pennsylvania, which is marked for identification, "Respondent's Exhibit V," and which you testified was a continuation of the same account as shown in Respondent's Exhibit U for identification. I now show you a signature card which the witness who just preceded you on the stand has produced from the West Side Company, and I will ask you to examine it, and state if that is your signature on it?

A. No.

Q. I show you 73 deposit tickets produced by Mr. Tibbett the officer of the West Side Trust Company and the Kingston Bank and Trust Company, and will ask you to examine them and inform his Honor whether or not your handwriting appears on any one of those tickets?

A. (After examination.) No.

Q. Did you at any time make a deposit in that account?

A. No.

185 Q. I call your attention to two cancelled checks produced by Mr. Tibbett, the officer of the West Side Trust Company and the Kingston Bank and Trust Company, and will ask you to examine them and state whether or not you signed either one of them?

A. This one here I signed [indicating].

Mr. WHITE. Referring to which one?

Q. Examine that again, Mr. McGowan.

A. No.

Q. You did sign it or did not?

A. No.

Q. You did not sign it?

A. No.

Q. It bears no resemblance to your signature?

A. No.

Mr. WHITE. That is objectionable, if the Board please.

Mr. LEMING. I don't know why?

Mr. WHITE. There is a conclusion on the part of the counsel. It is for the Board to determine from the testimony what resemblance exist or did not exist.

Mr. LEMING. The witness should know whether it resembles his signature.

The MEMBER. Objection overruled.

Mr. WHITE. Exception.

The MEMBER. The exception will be noted.



By Mr. LEMING:

Q. Did you get the money on either one of those checks?

A. No.

Q. There are two checks there; did you examine both of them to see whether you got the money on either one of them, or not, if you know.

186 A. I don't recall.

Mr. LEMING. If your Honor, please, I offer in evidence the two pass books identified by the witness heretofore as Respondent's Exhibits U and V. I offer in evidence at the same time the signature card identified as JJ, the two cancelled checks identified as Respondent's Exhibit LL, the ledger sheet of the account identified as Exhibit II, and the deposit slips identified as Respondent's Exhibit KK.

Mr. GILLESPIE. I object to the admission of these papers and documents at this time, because they are not connected up in any way with the petitioner by way of showing his knowledge of them, or his participation in the drawing of the checks or making of the deposits, or his ownership of the account. There is nothing shown upon these documents, and nothing shown by the testimony of the witness on the stand any relation or connection with the petitioner at this time, and I object to them for the reasons stated.

By Mr. LEMING:

Q. How did that account happen to be opened, Mr. McGowan?

A. That I don't know.

Q. Do you know whose handwriting that is on these deposit slips—if they are not all in the same handwriting, whose handwriting do you find on them?

A. Well, there is some Mr. McHugh, and some I could not tell whose it is.

Q. What, if anything, did you know about this account in the West Side Trust Company?

A. Nothing.

187 Q. Well, did you know there was such an account?

A. No.

Q. Do you know how supplies were purchased at the brewery?

A. No.

Q. How was malt purchased at the brewery?

Mr. GILLESPIE. Objected to as immaterial and irrelevant, and somewhat in the line of cross-examination.

The MEMBER. That objection will be overruled.

Mr. GILLESPIE. Exception.

The MEMBER. Exception noted.



The WITNESS. It came there in carload lots, and from what I understand—

By Mr. LEMING:

Q. Just what you know, Mr. McGowan—go ahead, unless counsel has something to say.

A. It was purchased with sight draft, bill of lading attached, sometimes to the Miners Bank at Pittston, and the West Side Trust Company, or the Kingston Bank.

Q. In whose name was it purchased?

A. That I don't know.

Q. Were you ever informed you could have any of the money at the West Side Trust Company?

Mr. GILLESPIE. We object to that as immaterial and irrelevant.

The MEMBER. It may be connected. The objection will be overruled at this time.

Mr. GILLESPIE. Exception.

The MEMBER. Exception noted. You may answer the question.

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By Mr. LEMING:

Q. To refresh your recollection, I will ask you to examine the ledger sheets here marked for identification, "Respondent's Exhibit II," beginning with the last sheet in reverse order, and see if any of those amounts refresh your recollection. If they do not, you cannot answer, and if they do, you may answer.

A. Yes; I remember of getting money out of the West Side Trust Company. I believe it was \$80. I was at Mr. Kehoe's home in Harding, Pennsylvania, and we were talking about money, and he told there was some money in that bank, and I should go down and draw it. I think it was \$80. I had this pass book at the window. It was the first time I was ever in the bank, and I received \$80, and the book. I am sure it was \$80, but this is not my signature [indicating].

Q. You say that is not your signature. What are you talking about now?

A. On this check.

Q. The check you have in your hand marked for identification on the back "Respondent's Exhibit II"?

A. Yes.

Q. Well, is that the only recollection you have of getting money out of that account?

A. That is the first time I was ever in that bank and the last.

Mr. LEMING. I renew my offer, if your Honor please.

Mr. GILLESPIE. I renew my objection.



The MEMBER. It does not seem to me, Mr. Leming, that this has been sufficiently connected up at this time. The offer will be denied.

189 By MR. LEMING:

Q. Mr. McGowan, I show you five check books with cancelled checks in them that you turned over to special agent Lucas. Where did you get them?

A. From William F. McHugh. They were kept at the brewery.

Q. Did you ever see them at the brewery?

A. No; the only time that I saw them was when we closed the brewery and when Mr. McHugh gave them to me to take home.

Q. Please look at them and see what bank the checks are on.

A. West Side Trust Company, Kingston, Pennsylvania.

Q. With cancelled checks in them?

A. Yes, sir.

Q. Do you see your signature on any of them?

A. No; I never signed any of those checks.

Q. But you say those check books were kept at the brewery?

A. Yes, sir.

Q. Do you know whether or not any items mentioned in these cancelled checks enter into the making of the income-tax return for 1925?

A. I believe they do.

Q. What makes you believe that?

A. Because these books were kept and correspond with Mr. Locke's account, who was secretary at the brewery, and it was for the material and the product that went out how my tax was based.

Q. Do you know of your own personal knowledge these cancelled checks, or the items represented by them in these four books I have shown you, were used in making up your income-tax return?

A. I believe they were.

190 Q. And that is the income-tax returns, the retained copies of which you already have in evidence?

A. Yes, sir.

MR. LEMING. If your Honor please, I resubmit my offer.

MR. GILLESPIE. Objected to on the same ground. There is no connection made. There is no connection shown as to the deposit of sums of money, or who has guilty knowledge of it. I will not ask you to listen to a repetition of my argument.

MR. LEMING. If your Honor please, the only thing on which counsel can base the argument is that this witness has lied from start to finish.



The MEMBER. We will take a recess until 2:00 o'clock. If you wish to submit any further statement in that regard, all right.  
(Thereupon at 12:45 o'clock p. m., a recess was taken in the above-entitled matter until 2:00 o'clock p. m.)

## AFTERNOON SESSION

The hearing was resumed at 2 o'clock p. m., pursuant to recess.

PATRICK F. MCGOWAN, the witness on the stand at the time of taking the recess, resumed the stand and testified further as follows:

## DIRECT EXAMINATION (Continued).

The MEMBER. It does not seem to me that this particular account has been properly identified, and the objection will be sustained. If they are later connected up, as I stated, we will consider that when we come to it.

191 Mr. LEMING. If your Honor please, would it be agreeable for me to withdraw this witness a moment and put another on the stand? I would like to dispose of this particular set of documents while we are at it, if it can be done.

Mr. GILLESPIE. For what purpose; to sustain this offer?

Mr. LEMING. As I understand, you want this connected up with the brewery?

Mr. GILLESPIE. I do not want anything. I am not asking that you connect it up with the brewery.

The MEMBER. As I understand, he wants to withdraw the witness and put another on.

Mr. GILLESPIE. I have no particular objection. He may do so.  
(Witness excused.)

Whereupon CHARLES J. LOCKE was called as a witness by and on behalf of the respondent, and having been first duly sworn, was examined and testified as follows:

## Direct examination by Mr. LEMING:

Q. You have given your name to the Reporter?

A. I have.

Q. Where do you live, Mr. Locke?

A. 32 Barney Place, Wilkes-Barre, Pennsylvania.

Q. How long have you lived there?

A. About 25 years.

Q. At that same address?

A. The same address.

192 Q. Where were you working in 1923?

A. In 1923 I think I was with the Kehoe Electrical Construction Company.



Q. Kehoe Electrical Construction Company?

A. Yes.

Q. Where was it located?

A. On South Main Street, Wilkes-Barre.

Q. Wilkes-Barre?

A. Yes.

Q. Who else was working there at that time?

A. Mr. William F. McHugh, the manager—

Q. William F. McHugh was the manager?

A. Yes.

Q. Who ran the Kehoe Electrical Construction Company?

A. Mr. John Kehoe.

Q. Mr. John Kehoe who is sitting at the table?

A. Yes, sir.

Q. Did you work at Bartell's Brewery?

A. Later on, after the construction company closed, I was sent over to the brewing company.

Q. You were sent over to the brewing company?

A. Yes; to take charge of the books.

Mr. GILLESPIE. I did not catch that.

The WITNESS. I was sent over to look after that set of books there [indicating].

Mr. LEMING. The witness is pointing to the set of books which you subpoenaed and which is the set of books which were kept down at the brewery.

By Mr. LEMING:

Q. You could probably take a look at the books and refresh your recollection as to the time when you went over to the brewery, could you not?

A. I could; yes.

193 Q. Did Billy McHugh go over to the brewery too?

A. He went over before I did.

Q. He went over before you did?

A. Yes.

Q. Do you know about how long before you went over?

A. It was some time before I went over. I think probably he went over around the early part of the spring, February or March, and I did not go over until about October.

Q. Was that 1924?

A. 1924; yes. Those books were installed and started previous to my going over there.

Q. You mean these books you are pointing to were started before you got to the brewery?

A. Yes, sir.

Q. Were you the bookkeeper at the Kehoe Electrical Construction Company?



A. Yes.

Q. And was that the nature of your work over at the brewery?

A. It was the nature of my work at the brewery; keeping the books.

Q. Did you keep all of the books over there?

A. Those books that you have right there are all of the books that I kept over there.

Q. These lying here on the table [indicating]?

A. Yes.

Mr. LEMING. May I have the retained copies of those income-tax returns, please?

[Mr. Gillespie hands papers to counsel for respondent.]

By Mr. LEMING:

Q. How old are you, Mr. Locke?

194 A. 64.

Q. Have you always lived down in that locality?

A. Yes.

Q. How long have you known John Kehoe?

A. I first met John Kehoe some time during 1920, in December, I think, some time in the early part of December 1920.

Q. Was that about the time you went to work for the Kehoe Electrical Construction Company?

A. No. There was an enterprise under Mr. Kehoe's jurisdiction known as the Indian Queen Bitters, and that is where I made the connection with him.

Q. That is where you first made a connection with him?

A. Yes.

Q. And did you go from that to the Kehoe Electrical Construction Company?

A. Right after that.

Q. Were you bookkeeper at the Bitters Company?

A. I installed the books of the Bitters Company.

Q. Where was that business conducted?

A. Pittston.

Q. Pennsylvania?

A. Pennsylvania.

Q. Do you know what they usually call Mr. Kehoe around his place of business?

Mr. GILLESPIE. If the Court please, I do not know what that leads to or what materiality it has.

The MEMBER. We will see.

Mr. GILLESPIE. I do not know what Mr. Leming means; which business do you mean?

495 Mr. LEMING. We will take the Kehoe Electrical Construction Company, for instance.



By Mr. LEMING:

Q. Did you understand the question, Mr. Locke?

A. Yes.

Q. Could you answer it?

A. They used to speak of him as the big boss or the big chief.

Q. The big boss or the big chief?

A. Yes.

Q. Now, when you went over to the brewery—I believe you said you were sent over to the brewery?

A. Yes.

Q. Who sent you over there, Mr. Locke?

A. Mr. William F. McHugh.

Q. Do you know in what capacity McHugh was working over at the brewery?

A. Manager.

Q. Manager?

A. Yes.

Q. Did he have any other title?

A. I used to hear the remark that he was Mr. John Kehoe's secretary.

Q. I show you a document here, Mr. Locke, that has been received in evidence as Respondent's Exhibit EE; it is a retained copy of an income tax return for the year 1924, and at the top of it says, "Patrick F. McGowan, Edwardsville, Pennsylvania"; will you examine that and see if that is your handwriting on it?

A. Yes.

Q. Now I show you another similar document, which is for the year 1925 and which is Respondent's Exhibit FF; do you recognize your handwriting on it?

196. A. Yes; that is my writing.

Mr. GILLESPIE. Did he say yes?

Mr. LEMING. Yes.

By Mr. LEMING:

Q. Now, I show you a similar document for the year 1926, which is an original income tax return, Respondent's Exhibit GG; do you recognize your handwriting on it?

A. Yes; that is also it.

Q. Now, did you make up those three returns, Mr. Locke?

A. Yes.

Q. Now, will you tell us from what records you made them up?

A. From my book records there.

Q. These books here on the table?

A. Yes.

Q. And what bank records, if any, did you have at the same time?



A. The Kingston West Side Deposit & Savings Bank.

Q. And what did those income tax returns propose to show in the way of income: was it income of Bartel's Brewery?

A. It was made out in the name of P. F. McGowan.

Q. And what income was it?

A. Income showing the net profit or loss.

Q. Of what?

A. Of the P. F. McGowan Brewery.

Q. Of the P. F. McGowan Brewery?

A. Yes.

Q. Is that the same brewery which is sometimes known as Bartel's Brewery?

A. Yes.

197 Q. Now, at the time the returns were made did they correspond to these books you have indicated and to the records of the Kingston Bank & Trust Company or West Side Trust Company?

A. I think they did.

Mr. LEMING. Now, if your Honor please, I intended to call this witness at another point for further examination. I do not want to trespass here one way or the other, but I wanted to dispose of it if we could, of these particular documents, at this time. Now, it seems to me this witness' testimony up to this point has quite definitely made the connection of this bank account with this brewery. This witness' testimony, it seems to me, has been quite clear, and I now renew the offer, that offer being the signature card, canceled checks, deposit slips, and ledger sheets which were produced by Mr. Tippet, an officer of the bank.

The MEMBER. What was his knowledge of the bank account?

Mr. LEMING. This witness' knowledge?

The MEMBER. Yes.

By Mr. LEMING:

Q. Will you tell his Honor what you knew about this West Side Bank Account and Kingston Bank & Trust Company account.

A. I used to make up the vouchers and Mr. McHugh would O. K. them, and I would then write the checks. My writing is in the check books, and the checks were signed by William F. McHugh, signing McGowan's name. It is McHugh's writing. That is all I can say. I wrote the checks, and he verified the vouchers, and I drew the checks, and he signed them in McGowan's name.

198 Mr. LEMING. I might call the witness' attention to two of the checks which Mr. Tippet produced and which are in evidence as respondent's Exhibit LL.



By Mr. LEMING:

Q. Will you state what part of those checks is in your handwriting and what part is in Mr. McHugh's handwriting?

A. Those checks are in my handwriting except for the signature by William F. McHugh with McGowan's name, P. F. McGowan, written by McHugh.

Q. Does that also apply to the other check, which is part of the same exhibit?

A. The same thing.

Mr. LEMING. If your Honor please, we have a lot of canceled checks we could follow through in that way, but it seems to me now the connection is so complete there should be no controversy about these documents.

The MEMBER. Do you renew your offer?

Mr. LEMING. Yes.

The MEMBER. Any statement, Mr. Gillespie?

Mr. GILLESPIE. Oh, yes, your Honor.

I merely want to say what I think is apparent, and that is there is no connection between Joe Kehoe and this brewery deposit. There is nothing to show where the money came from; there is nothing in the witness' testimony, any more than there was in McGowan's, showing where the money came from or who controlled it, except that Billy McHugh drew the checks. But what was the source of the money? How could we be held responsible for an accumulation of money in a deposit when there is no connection between us and the deposit? I do not want to repeat all that I said before. The fact Mr. McHugh drew checks on the account has no significance, as the money might be deposited by someone else entirely. There is nothing to show it is income of the brewery; there is not a word to show that.

The MEMBER. Is that all?

Mr. GILLESPIE. Yes.

The MEMBER. It seems to me it has been sufficiently well connected up and that most of your remarks would go to the weight of the evidence.

The exhibits will now be admitted and marked according to the numbers by which they have been identified.

Mr. GILLESPIE. Exception.

The MEMBER. Exception noted.

The CLERK. The ledger sheets are Exhibit II.

(The sheets referred to were received in evidence and were marked "Respondent's Exhibit II," and made a part of this record.)



The CLERK. The signature card is JJ.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit JJ" and is made a part of this record.)

The CLERK. The deposit slips, 23 of them, are Exhibit KK.

(The deposit slips referred to were received in evidence and were marked "Respondent's Exhibit KK" and made a part of this record.)

The CLERK. The two canceled checks are LL.

(The checks referred to were received in evidence and were marked "Respondent's Exhibit LL" and made a part of this record.)

200 Mr. GILLESPIE. May I see the two canceled checks, please?

Mr. LEMING. Just as soon as the Clerk finishes with them.

My offer originally had included also the two pass books identified by the witness; they carry with the offer, I believe.

The MEMBER. That is correct.

Mr. LEMING. Those are Exhibits U and V.

The MEMBER. They may also be received.

(The documents referred to were received in evidence and were marked "Respondent's Exhibits U and V" and made a part of this record.)

Mr. LEMING. If your Honor please, I had called the witness at this point only to aid in the matter of these records, and I do not want to examine him further here, but reserve the right to recall him.

The MEMBER. You may recall him.

Mr. GILLESPIE. And we also reserve the right to recall him for cross-examination.

The MEMBER. Yes.

Mr. GILLESPIE. Will you bear with us just a moment, your Honor?

The MEMBER. Surely.

Cross-examination by Mr. GILLESPIE:

Q. Mr. Locke, will you kindly look at each of those two checks, the Government Exhibit LL, and tell me, if you know, who wrote the name P. F. McGowan as the maker of the check?

A. That is Mr. McHugh's writing.

201 Q. In whose writing is the name P. F. McGowan upon the back, the endorsement upon the back?

A. It looks like the same signature to me.

Q. Like what?

A. The same signature.

Q. I call your attention to a check No. 759, which was admitted as one of the exhibits to be marked LL, and ask you to look at



the signature upon that check, P. F. McGowan, and tell me whose handwriting that is, if you know?

The MEMBER. Now, Mr. Locke, you listen to the Reporter while he reads the question again and answer it to the best of your ability.

(Question again read by the Reporter.)

The MEMBER. If you know whose it is, you may say so.

The WITNESS. It looks like Mr. McHugh's handwriting.

The MEMBER. It looks like it?

Mr. LEMING. He testified on direct examination that it was.

By Mr. GILLESPIE:

Q. Would you be sure about that; would you be certain of it?

A. It looks like his writing.

Q. You are not certain about it, though?

Mr. LEMING. He did not say that.

Mr. GILLESPIE. Pardon me, but I am entitled to have an answer without any argument from counsel. I am entitled to have an answer without Mr. Leming's comment as a part of it. That is not trying a case with a record properly; he knows that better than I, perhaps.

Mr. LEMING. All right.

By Mr. GILLESPIE:

202 Q. Look at the endorsement upon the back of the same check, P. F. McGowan; will you say that is or is not McGowan's handwriting?

A. That is not McGowan's handwriting.

Q. It is not?

A. No.

Q. Then, you think it is whose?

A. Mr. McHugh's.

Q. Mr. McHugh's?

A. Yes.

Q. Very well. You drew those checks, did you?

A. Yes.

Q. Did you draw the checks upon this account upon which these two checks were drawn?

A. Yes.

Q. Do you know what I refer to?

A. I drew the checks in the books there.

Q. You drew the checks in the books in which the checks appeared to be filled out when amounts were drawn from that account; did you, or did you not?

A. I will not say I drew every one of them. There might have been a special check Mr. McHugh might have drawn himself.



Q. He may have drawn them, or you?

A. Everything on materials and pay rolls I drew checks; if there was some little account, he might have drawn it himself.

Q. Virtually, who drew all of the checks?

Q. You virtually, from what I understood from what you said, drew all of these checks with the exception of perhaps a few?

A. All pertaining to the near-beer business.

Q. That is all you know anything about?

A. That is all I know anything about.

Q. That is true. That does not puzzle you, does it?

A. Not a bit.

203 Q. Of course not. Now, I show you deposit slips on the West Side Trust Company produced here and marked "Respondent's Exhibit KK"—they are all of them marked "KK" by the Government. Will you kindly look at those? There are 70-odd slips. Look at the name at the top of each slip, namely, P. F. McGowan, and tell us, if you know, in whose handwriting the name P. F. McGowan appears on each of those slips?

A. They all appear to be in McHugh's handwriting.

Q. Repeat that, please.

A. They all appear to be in McHugh's handwriting.

Q. Very well. Now, Mr. Locke, I assume you do not know anything about the deposits of money making up this account to which we are referring and upon which the checks were drawn or slips made?

A. I know Mr. McHugh used to make deposits while he was over there and I would sometimes make deposits myself and sometimes he would send Mr. Kearns or sometimes Francis Kane. Usually he made the deposits and he would tell me how much the deposit was that he made, and I would enter it on the stub of the check book to get the bank balance.

Mr. GILLESPIE. That is all.

The MEMBER. Anything further at this time, Mr. Leming?

Mr. LEMING. No, if your Honor please.

The MEMBER. You may stand aside and be called later, Mr. Locke.

(Witness excused.)

204 PATRICK F. MCGOWAN was recalled as a witness by and on behalf of the respondent and, having been previously duly sworn, was examined and testified further as follows:

Direct examination (continued) by Mr. LEMING:

Q. Now, Mr. McGowan, I show you eight books which seem to be canceled check stub books, with the canceled checks in them, and as I recall, you have already testified you obtained those



books from Mr. McHugh. Now, are those the only books that you did so obtain?

A. Yes, sir.

Q. Did you turn over to Special Agent Lucas all of the canceled check books and canceled checks that were in your possession in connection with the West Side Bank of the Kingston Bank & Trust Company?

A. Yes, sir.

Q. I call your attention to the fact that these books do not contain checks in consecutive order or in consecutive dates, but there are missing numbers and missing dates between some of the books; do you know where any of the other books are or where any of the other canceled checks are?

A. No.

Mr. LEMING. I would like to have these eight volumes marked for identification. The witness has just identified them and testified concerning them.

The MEMBER. They will be marked for identification.

The CLERK. MM, NN, OO, PP, QQ, RR, SS, TT.

(The documents referred to were thereupon marked "Respondent's Exhibits MM, NN, OO, PP, QQ, RR, SS, and TT," for identification.)

Mr. LEMING. You may take the witness.

Cross-examination by Mr. GILLESPIE:

Q. Mr. McGowan, where were you born?

A. Freeland, Pennsylvania.

Q. How old are you?

A. I will be 52 on the 29th day of March.

Q. What has been your employment generally until the time you became identified with the Wilkes-Barre Base Ball Club?

A. Well, I worked in the mines at Gaddo for about 20 years.

Q. That was your occupation generally until you became identified with the Ball Club?

A. No, sir. I was with the Mauch Chunk Brewery and also a while with the Freeland Brewery.

Q. Was that during prohibition days or was it previous to prohibition?

A. Both before and after.

Q. Were you engaged in the brewery business in violation of law after prohibition days or during prohibition days?

A. No; I worked in the brewery.

Q. Was it a near-beer brewery or was it one making high-powered beer?

A. Near beer.

Q. Each of the breweries?



A. No.

Q. Was it near beer or not?

A. I worked in the Freeland Brewery before prohibition and in the Mauch Chunk Brewery after prohibition.

206 Q. Was the manufacture legal or illegal; were you making legal or illegal beer?

A. Not at the time I was there.

Q. When were you there?

A. I was there when the brewery was under padlock.

Q. You were on the premises of the brewery while it was under padlock?

A. Yes.

Q. What were you doing there while the brewery was under padlock?

A. I was there taking care of the brewry while the owner was under guard.

Q. And he had been running an illegal brewery before it was padlocked?

A. I suppose so.

Q. And you were a watchman?

A. Yes.

Q. How long were you employed there?

A. About six months.

Q. In what year was it?

A. I cannot recall.

Q. Well, it is immaterial. Now, when you say Mr. Kehoe met you or you were introduced to him, you were earning about \$1,800 a year in connection with your work as an employee of that base ball club; is that right?

A. About right.

Q. Is there anything not right about it?

A. The club was only going about six months of the year and my salary did not include that, because in the winter months it was cut down. I do not recall what it was.

Q. Then you took this alleged employment with Mr. Kehoe under the same salary, virtually, for the year?

A. About the same.

Q. \$150 a month?

A. Yes, sir.

Q. And when you met Mr. Kehoe you say you made some arrangement with him about employment as his representative, you knew what he was going to do, namely, to operate a brewery contrary to law?

A. Yes.

Q. There is no doubt about that, is there?

A. That is right.



Q. And you then willingly and knowingly entered into an employment with him to engage in work which was in direct violation of the laws of the United States?

A. Yes.

Q. That is without any question?

A. Yes.

Q. And you intended to continue in that work as long as you were so employed?

A. Yes.

Q. And you did?

A. Yes.

Q. And you violated the law every day you did any work in connection with that unlawful business?

A. Yes.

Q. Without any hesitation?

A. No.

Q. Or compunction?

A. No.

Q. Or conscience?

A. No.

Q. You did that knowing that you were a law violator?

A. Yes.

Q. And you were willing to risk the penalty of the law if you were convicted of violating the criminal law?

A. Yes.

Q. And you were willing to take the punishment?

A. Yes.

Q. And became a felon?

A. Yes.

Q. All in order to make \$150 a month?

A. Yes.

Q. And that was the sole purpose, to make it?

A. No.

Q. What other purpose had you in taking the employment?

A. I expected more money than \$150 after the brewery had closed, and my agreement with Mr. Kehoe so specified.

Q. From whom did you expect to get more?

A. Mr. Kehoe.

Q. In addition to the salary he promised you?

A. Yes.

Q. On what did you base your expectation to get more money after the brewery had closed?

A. On the promise of Mr. Kehoe.

Q. To what effect?

A. To the effect that I was to receive more money after the contract had expired, after the brewery had closed.



Q. How much more money?

A. Between \$60,000 and \$75,000.

Q. You were to receive \$60,000 to \$75,000 after the brewery's work was ended?

A. Yes.

209 Q. And after he had stopped operating it?

A. Yes, sir.

Q. Why not get a portion of that each month while it continued to operate?

A. I did not get it.

Q. I did not ask that. I said why did you not get it; did you attempt to get it?

A. Yes.

Q. During the operation of the brewery?

A. Yes.

Q. Although you said a moment ago you were to receive it after the brewery had closed operations?

A. But we talked over it many times.

Q. Over what?

A. This money.

Q. This particular \$60,000 or \$75,000?

A. Yes.

Q. And each time you talked, an amount was specified?

A. Yes.

Q. As between \$60,000 and \$75,000?

A. Yes.

Q. Regardless of how long the brewery might continue to operate and how much money it might make?

A. No; that was from 1925 on. When the Cleveland case first came into view, that is when we talked about \$60,000 to \$75,000.

Q. I was asking you about the time you took service?

A. No; I worked then at an understanding of \$150, or whatever he felt like giving, up until then.

Q. But he felt like giving you only \$150, and you accepted it?

210 A. Exactly.

Q. During that period up to 1925, when there was some trouble in Cleveland about this brewery, you had continued to receive \$150?

A. No; I was getting about \$325.

Q. That is, by paying for a car which you spoke of on direct examination?

A. Yes, sir.

Q. For your benefit?

A. Yes.

Q. And owned by you?

A. Yes, sir.



Q. Now, after the trouble in Cleveland you talked to Mr. Kehoe about getting a larger sum of money in a lump sum; do I understand that correctly?

A. That was after our lease ran out. I expected a lump sum of money; yes.

Q. Let me get that straight. Did you make the arrangement with him during the continuance of the operation of the brewery or after the lease ran out?

A. During the continuation of the brewery; it was sometime in 1925.

Q. And then you and he agreed, or, rather, he promised to give you between \$60,000 and \$70,000, after the lease had run out and the work had stopped?

A. Yes.

Q. After the operations had ended?

A. Yes.

Q. Then he said he would give you between \$60,000 and \$75,000?

A. Yes; but that was in 1925.

Q. May we agree on that?

211 A. Yes.

Q. What was the purpose of that additional magnificent offer of money to you?

A. I do not know.

Q. Have you not the slightest idea?

A. I felt it was for the rap I was taking and that I was entitled to it.

Q. But you got no rap?

A. But I came near. We were not sure we would get it at that time or not.

Q. When was this hearing or criminal proceeding in Cleveland to which you refer?

A. I cannot recall.

Q. About? This is a serious matter, sir.

A. I think that was in—I cannot recall that.

Q. You have no idea?

A. No. I know when it was but I cannot recall when I was indicted in Cleveland.

Q. I did not ask that. When did this trouble occur of which you speak and for which you were to be so well reimbursed, indefinitely later?

A. I believe the investigation was on in 1925, the latter part of 1925. The investigation was on then. I believe it was a year after before I was indicted in Cleveland.

Q. With respect to the beginning of the investigation and with respect to the indictment, when did he make this promise to you?



A. In the latter part of 1925.

Q. With respect to the indictment, was it before or after?

A. It was before the indictment.

Q. With respect to the investigation, was it before or after?

A. It was before the investigation.

212 Q. He promised you that before the investigation?

A. While it was going on, or in that time.

Q. There was no immediate incentive for his offering you such a magnificent sum of money before the investigation had started, was there?

A. No.

Q. Why did you not make such a deal when you got the employment in the first place; the situation was just the same then, was it not?

A. No.

Q. Nothing had happened?

A. No.

Q. No investigation had taken place?

A. No.

Q. Then, what incentive was there for him to make an offer at that time which did not exist when you took the job?

A. But in 1924 I was cited and our permit was jeopardized in a hearing before Mr. Shannon in the Post Office Building in Wilkes-Barre, Pennsylvania, and it was from that time on, between that and up to the Cleveland investigation, that Mr. Kehoe and I made this agreement.

Q. Because you had undergone an investigation pertaining to your permit?

A. Yes.

Q. And for that reason he promised you this great sum of money?

A. Yes.

Q. Without saying definitely when?

A. No.

Q. And without knowing whether the business would continue for a year or ten years?

A. No.

Q. Or whether prohibition might cease and the business might be able to continue lawfully?

213 A. No.

Q. You did not know that?

A. No.

Q. So your expectation was so indefinite that you could not hope to get the money and you did not, did you?

A. Yes.



Q. How?

A. Because up until the time my lease and contract expired, February 28, 1927—

Q. But you did not get it when the lease expired and your contract ended?

A. No.

Q. And you were disappointed, were you not?

A. Yes.

Q. Deeply?

A. Yes.

Q. Wounded?

A. Yes.

Q. Angered?

A. Yes.

Q. Embittered?

A. No.

Q. Well, that is another word for it. From that time on you were hostile to Mr. Kehoe?

A. I was not hostile, but I was not very friendly toward him.

Q. You never made any threats against him?

A. No.

Q. You never said you would get even with him or that you would fix him or destroy him?

A. I do not think so.

Q. You will not deny you made such threats, will you?

A. I never made those threats.

214 Q. Will you deny you did not make the threat to get even with him or destroy him?

A. No.

Q. You might feel like it?

A. Yes.

Q. And you did feel that way, did you not?

A. Yes.

Q. And you feel that way now?

A. No.

Q. Why not?

A. No.

Q. Are you not getting even with him now?

A. No.

Q. Is this not the culmination of it all?

A. No.

Q. It is not?

A. No.

Q. When do you expect to get even with him, if not now? Do you understand the question?



A. Yes.

Q. Will you please answer it?

A. I do not know.

Q. You do not know?

A. You were going so fast I do not believe I understood the question.

The MEMBER. Will you read the question?

(The question was read by the Reporter as above recorded.)

The WITNESS. Yes.

By Mr. GILLESPIE:

Q. Yes, what; what do you mean by yes; what do you mean by yes, Mr. McGowan?

A. Even—did you say even?

Q. You heard the question and I am not arguing with you. I am getting a record matle up. You know what I meant when I asked you that question. If not, I will ask it be read again. Do you wish to have it read again?

215

A. Yes.

(Question again read by the Reporter.)

The WITNESS. I do not know when.

By Mr. GILLESPIE:

Q. But you hope some time in the future, of course?

A. I would not say that; no.

Q. What would you say?

A. I would say I do not know.

Q. You do not know just when it will be?

A. No.

Q. But you hope the time will come, naturally?

The MEMBER. It seems to me he has answered that question.

The WITNESS. I would not say that.

By Mr. GILLESPIE:

Q. What would you say?

A. I would say I do not know.

Q. You do not know what?

A. When I will get even with him, I do not know.

Q. When do you hope to get even with him? Let me put it that way.

A. I do not know when I hope to get even with him.

Q. But you have a present hope of getting even with him?

A. I will not say that.

Q. Now, Mr. McGowan, getting away from that feature of cross-examination that we have discussed, you have another incentive for pursuing Mr. Kehoe in this proceeding, have you not?

A. No.



Q. Let me refresh your recollection; do you not hope to obtain a reward?

A. Now I do; yes.

216 Q. Certainly. Did you not ever hope to get any reward—

A. Not up until about two years ago.

Q. You then had definite hopes of getting a reward?

A. Yes.

Q. And this hearing and proceeding comes on two years after the time you formed a definite hope to get a reward?

A. No. In 1932 was the time, the only time I ever discovered I was going to get a reward; in 1933.

Q. And you were happy to discover it?

A. No.

Q. You hoped to get it then and you still hope to get it?

A. Yes.

I think at this point we will take a five- or ten-minute recess.

(Thereupon a recess was taken for 10 minutes, at the conclusion of which the following occurred:)

Q. When we took the recess we were speaking about your first knowledge of your right to receive a reward, if, in the opinion of the Government, or the judgment of the Government, you were entitled to it, we were speaking about that; that is right?

A. That is right.

Q. Now, you say about 1932 you first learned that you could obtain such a reward?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. No mistake about it?

A. No, sir.

217 Q. How did you come to discover in 1932 you could receive a reward for testifying in any proceeding to recover taxes and penalties from John Kehoe?

Mr. LEMING. The question is objected to because it is not a fair question. He is not paid for testifying at any time.

The MEMBER. The objection will be overruled.

Mr. LEMING. If your Honor please, with all great deference to your Honor, I assume that you have the question in mind that is now pending.

The MEMBER. I have.

Mr. LEMING. May I have an exception?

The MEMBER. You may.

Mr. GILLESPIE. Will you please read the question?

(Thereupon the reporter read the pending question as follows:



"Q. How did you come to discover in 1932 you could receive a reward for testifying in any proceeding to recover taxes and penalties from John Kehoe?")

A. From my attorney George M. Murdock.

By Mr. GILLESPIE:

Q. In 1932?

A. In 1932.

Q. There is no question about that?

A. Yes, sir.

Mr. LEMING. Now, if your Honor please, I just want to keep the record straight, that is all. We had a little discussion once before today about the subpoenaing of a document here which is a claim for reward. I stated at the time it was not signed as filed by this witness. That will show by the certification.

Now, your Honor postponed the time when the admissibility, or the use of that document would be ruled upon. Now, I submit that it is unfair, and it is not the proper use of the document for counsel to have it before him here in the absence of a ruling as to whether or not he can use it, and how he can use it.

If he is going to put it in evidence, the proper way is to offer it in evidence, and bring it to the attention of the witness on the stand. I turned it over to him with the idea that at the appropriate time there would be a ruling about this document. I might well have stood on my rights, and held that document in my hand. I turned it over to counsel, and he has it open before him. I submit now he should return it to me as the proper custodian of it for the Treasury Department, or he should offer it in evidence and let your Honor rule.

The MEMBER. This is a matter that was brought out on direct examination. It is a proper subject of cross examination, and I do not know of any rule which requires the placing of the witness on the witness stand that has not been subpoenaed. Counsel does not care to introduce, and it seems to me that counsel may proceed with his cross examination, and the objection which has been made will be overruled.

Mr. LEMING. May I have an exception?

The MEMBER. Exception noted.

Mr. LEMING. Now, I should like to make this further objection to the pending question as I understand it. As I understand the rule of evidence, counsel can not sit at the counsel table with a document of this sort before him and attempt to get the witness to make statements not in pursuance of this very document, which this witness has a right to see. Now, when he asks him any of these questions, he has a right to have



the document before him, and I have seen quite learned counsel insist upon that rule; and I have seen the Board require counsel to walk over and hand the document to the witness before he answers.

Now, in the pending question I submit that this witness is entitled to take this document in his hands before he answers. I do not know of any rule better established than that.

The MEMBER. That may be true. I do not know that he should have it before he answers the question. Let's have the question.

Mr. GILLESPIE. Of course, before we are through I will show him this.

Mr. LEMING. Why not show it to him now?

Mr. GILLESPIE. This is not an original document for him to identify. The Government has identified this document, and sends it here in response to our subpoena.

Mr. LEMING. A certified copy of the original the subpoena called for.

Mr. GILLESPIE. Suppose that I had memorized everything in this document, and had all of the information, which I could not do of course, in the short time, and then without saying a word about it I had asked him a multiple of questions concerning the information which I had obtained from these papers, would that entitle him to see it.

The MEMBER. Please read the last question.  
220 (Thereupon the reporter read the questions and answers as follows:

"Q. How did you come to discover in 1932 you could receive a reward for testifying in any proceeding to recover taxes and penalties from John Kehoe?

"A. From my attorney George N. Murdock.

"Q. In 1932?

"A. In 1932.

"Q. There is no question about that?

"A. Yes, sir.")

Mr. LEMING. I move that the question and answer be stricken until the witness is furnished with this document.

Mr. GILLESPIE. If your Honor directs me, I will show him this, if you wish to restrict me in my questions.

The MEMBER. There is a motion pending on the question and answer. Mr. Reporter will you please read that again?

(Thereupon the reporter read the questions and answers above quoted.)

Mr. LEMING. There is a question about it.

Mr. GILLESPIE. The answer was in answer to the question. I asked him if that was true.



Mr. LEMING. Now, my motion goes to the last question and answer, that they should be stricken until this witness is shown these documents.

The MEMBER. The motion will be denied.

Mr. LEMING. Exception.

The MEMBER. The exception will be noted.

By Mr. GILLESPIE:

Q. Now, you knew, of course, Mr. George N. Murdock—you say he was your lawyer?

221 A. Yes, sir.

Q. When did he become your lawyer?

A. On about May 24, 1929.

Q. Well, what information did you receive from him with reference to a reward, a possible reward, a future reward of any kind for the information you might give in this case?

A. Can I explain?

Q. Certainly you can explain.

A. The conditions on which I engaged Mr. Murdock?

Q. As far as I am concerned.

The MEMBER. Go ahead.

A. I have to go back to a Friday night before the Court of Appeals handed down a decision in regard to my case, Carl Bossard and William Bossard; and William F. McHugh. I do not know just the exact date of that decision, but a Friday night before that came up, I was called to Mr. John Kehoe's home in Harding, Pennsylvania. I went there with my wife and my baby. Mr. Kehoe and I talked over this case that was coming up in Philadelphia, and he said, "If they find a true bill and return you to Cleveland, you must go to jail." I said, "Mr. Kehoe, I am satisfied I have not broken my word." I said, "John, if I go to jail, I want to know whether my wife and baby are going to be protected." It was then that Mr. Kehoe promised that I would receive between \$60,000 and \$70,000. I said all right, fair enough. I returned with the understanding from Mr. Kehoe that on Sunday night between seven and eight o'clock I would go up to his home, that was when I was to receive the money.

222 Saturday, in the place of the case coming up on Monday, I can not recall the date, but the case was to come up on Monday. I picked up a paper, and I saw where the decision of the Court of Appeals had discharged Mr. Bossard, William F. McHugh, and a lady. I don't know her name, but I know that she is a sister of William Loughran.

From that day on I called Kehoe, and I went to Kehoe's, and I met Mr. Kehoe and George Buss in the Mayor's office in Pittston, Mr. Gillespie, and I never received one cent.



Coming home later I met in Mr. James McQuade's office a man by the name of Jack Lynn. I explained my case to him, and I told him that I was in a bad way because I did not know when the United States Government would come back after me for income tax on which I had filed, and he advised me—I told him I could not get a lawyer from around Wilkes-Barre, for I was afraid of them, and he advised me to get in touch with a lawyer—

MR. GILLESPIE. Just a moment, I object to any conversation with Mr. Lynn in Mr. Kehoe's absence.

THE WITNESS. All right.

THE MEMBER. You asked for the explanation.

MR. GILLESPIE. I beg your pardon, your Honor, I asked for no such explanation.

THE MEMBER. You asked for the information as to how he got in touch with Mr. Murdock. We will see if this is the explanation and if not we will strike it.

Go ahead Mr. McGowan.

A. (Continued.) I got in touch with Mr. Murdock, and I met him on the 24th day of May at Harrisburg in the presence of Jack Lynn, and I don't know just who else. I explained my case to him. I explained about the money that I expected and 223 he said, "I will take the matter up with Mr. Kehoe." That was the last I heard of Mr. Lynn until the 2nd day of June 1929.

I met Mr. Murdock in the Washington Hotel, at Washington, D. C., with Pam Jones, Jack Lynn, and Tommy Quigley. Mr. Lynn said I had no contract with Mr. Kehoe of any kind, and he could not make any collection or enter suit, and he advised me to make myself right with the United States Government in regard to my income tax, to go over and tell them what I knew. I went over in the presence of Mr. Paul Jones, Mr. Lynn, and Mr. Cox or Fox, and Mr. Malone, and there I gave my statement without speaking of any consideration, only my own protection in regard to my income tax. I have heard no more about the case. I got a letter from Mr. Murdock at one time, but I knew nothing at all about this document until I met Mr. Murdock in this building the day this case started.

By MR. GILLESPIE:

Q. Now, you say you knew nothing about it until you met Mr. Murdock here during this proceeding?

A. That document; yes.

Q. Didn't you have a contract with Mr. Murdock; I will show you what the Government furnishes here.

A. Yes.



Q. Whether or not you had a contract with Mr. Murdock with reference to that reward or prospective reward in this case?

Mr. LEMING. Let him see the document.

Mr. GILLESPIE. All right. I will. Let me pursue my own course, and I will be fair to the witness.

Mr. LEMING. No; let him see it. You stand here with  
224 the document held away from the witness.

By Mr. GILLESPIE:

Q. Look at that [handing document to witness].

Mr. LEMING. That is right.

Q. Take plenty of time.

A. I never saw this document before.

Q. You have read it over.

A. No; not thoroughly.

Q. Well, if you have not read it over perhaps I can refresh your recollection. This document about which you have been talking appears to be a copy of an alleged contract purporting to have been signed by Patrick F. McGowan, 92 McCarragher Street, Wilkes-Barre, Pennsylvania; Paul T. Jones, 28 Division Street, Kingston, Pennsylvania; and George N. Murdock, 112 West Adam Street, Chicago, Illinois. Have you any knowledge of such a contract entered into by you and Paul Jones and George N. Murdock?

A. I don't recall it.

Q. Look at this; finish reading it.

A. I cannot recall ever signing that contract.

Q. Then do you mean to infer this is—

A. I can't recall.

Q. That it is fraudulent in any respect?

A. No; I would not say that.

Q. You will not question the authenticity of this?

A. No.

Q. It is certified by the Assistant Secretary of the Treasury of the United States?

A. Maybe so.

Q. And it purports to be a contract entered into by you, Patrick F. McGowan, Paul Jones, and George N. Murdock, your lawyer.

225 A. The only statement I made in Washington that I can recall is the statement that we signed between Paul Jones and myself in Mr. Irey's office in the presence of Fox. I cannot recall any other one.

Q. I will have to ask you to read that again to refresh your recollection. You have not read you said after two attempts. Please read it all.



A. (After reading.) I believe I signed that, Mr. Gillespie.

Q. Is there any question about it, Mr. McGowan?

A. No, sir.

Q. You did?

A. Yes, sir.

Mr. LEMING. So that his Honor will know what is going on here, I wonder if you would mind handing his Honor the document.

Mr. GILLESPIE. I will in due time.

Mr. LEMING. His Honor is no doubt laboring under considerable doubt as to what is going on. He does not know what you have got before you, and he is laboring under doubt, and he does not know, and how can he rule on the evidence unless he knows what it is?

The MEMBER. If it will speed things up, let me see it. I think I know what it is.

Mr. GILLESPIE. Certainly, there is no secrecy about the records of the United States Government.

(Document referred to handed to Member.)

By Mr. GILLESPIE:

Q. Now, from what you have read in this document, which has refreshed your recollection, you met Mr. Murdock about June 1929, will you say that?

226 A. Yes, sir—no; I met Mr. Murdock on June 3, 1929.

Q. I said June 1929.

A. Yes, sir; about that time.

Q. The date appearing here is June 4, 1929.

A. That is about that date.

Q. Now, did you make this alleged agreement which is embodied in this certification about the same time the certification shows your name appears?

A. I believe I did.

Q. And Murdock's name?

A. Yes, sir.

Q. Now, with reference to the decision of which you spoke as having been made by the Court of Appeals in your case, was that before that decision was rendered on that appeal or after?

A. After.

Q. Do you remember how long afterwards it was?

A. No; I do not. I cannot remember the date.

Q. Now, the agreement entered into, copy of which is in these documents, contains all of the matters of which you had knowledge at that time, I suppose?

A. Yes, sir.

Q. And nothing else?

A. Well, I would not say that.



Q. And when you made that agreement substantially it was for the purpose of obtaining a reward, if a reward was coming to you?

A. That was after I went over and made my statement that I talked to Mr. Murdock.

Q. And your purpose was to take care of your personal interests?

227 A. Yes, sir.

Q. Following your own trouble?

A. Yes, sir.

Q. And protect yourself thoroughly?

A. Yes, sir.

Q. By giving the testimony embodied in this agreement?

A. Yes, sir.

Q. And that was your only purpose, to protect yourself in giving that at that time?

A. No; my purpose was to protect myself in regard to my income tax when I went there.

Q. Yes; but also in reference to a matter of reward?

A. Well, when I went there, I did not know about the reward.

Q. When you got there you did learn about it?

A. That was after I gave the testimony.

Q. About the time you made this agreement?

A. That was after.

Q. When you made this agreement you had in mind obtaining a reward, if possible?

A. No, sir.

Q. For what purpose did Mr. Murdock represent you?

A. At my request it was Mr. Murdock's instructions to me to go over and give the information, but there was no reward spoken of.

Q. Not then; of course not.

A. No, sir.

Q. But the question of reward was in the future?

A. I did not know it until about the 4th of June. I was there from the 2nd of June until the 4th of June, and I believe my testimony given in the Treasury Department was on the 3rd of June.

228 Q. Now, you have read over this document, and you find that your lawyer, Mr. Murdock, set forth in this document that, "Full assistance has been given to the Department by Mr. Lynn, Mr. McGowan, and Mr. Jones and myself, and this claim is made by myself on their behalf in accordance with a signed agreement entered into at the time of the original visit to Mr. Irey's office, which agreement is as follows."

Q. Is that a true statement by your lawyer or not?

A. Yes, sir; it is.



Q. Very well, then that agreement was made just as alleged here by Mr. Murdock?

A. Yes, sir.

Q. Where did you meet Mr. Murdock?

A. In the Washington Hotel, Washington, D. C.

Q. At the time referred to in this agreement?

A. Yes, sir.

Q. Now, in going back there, may I ask who paid your expenses to Washington and coming back?

A. I paid my own, that is my own car fare.

Q. How about your other expenses?

A. They were paid by my friend, Jack Lynn.

Mr. LEMING. Couldn't the witness have the document?

Mr. GILLESPIE. Yes.

The WITNESS. I don't need it.

By Mr. GILLESPIE:

Q. Now, I will quote from this document which you do not wish to look at, this purporting to be a statement by your attorney?

"All expenses of travel and hotel fares by Mr. Jones and 220 Mr. McGowan were advanced by Mr. Lynn and myself."

Q. Is that true or not?

A. Mr. Lynn is all I know. I don't know about Mr. Murdock. Mr. Lynn said he would take care of me, and I don't know anything else about it.

Q. Now, may I read this further to you, which is part of this alleged contract which you say you recall having signed:

"This matter concerns information which is to be given to the United States Bureau of Internal Revenue, Special Intelligence Unit, by Paul Jones of Wilkes-Barre, Pennsylvania, and Patrick F. McGowan, of Wilkes-Barre, Pennsylvania. It is given with the express understanding that Mr. Jones and Mr. McGowan will file a claim for reward in the amount of 10 per cent of all amounts recovered by the Government of the United States in taxes, penalties, interest, or fines which the Government may receive as a result of, or growing out of the information which they are voluntarily turning over to the Government."

Q. You recall that fact?

A. I believe I do.

Q. That is correct?

A. That is correct.

Q. And in pursuing that and continuing to give information as you are in this proceeding, that is founded upon this hope embodied in the contract which is expressed in that agreement?

A. Yes.



Mr. GILLESPIE. Now, if your Honor please, we are now willing to offer this in evidence, in response to the question of Mr. Leming.

230 Mr. LEMING. There is no objection.

The MEMBER. It will be admitted and marked "Petitioner's Exhibit No. 1."

(The document referred to was received and marked "Petitioner's Exhibit No. 1," and made a part of this record.)

Q. Now, with reference to any claim filed, or as filed as shown by Exhibit No. 1, Murdock represents you in obtaining any reward that may be forthcoming to you for information that you have given, and are giving, or may give in the future; that is correct?

A. Yes, sir.

Q. And you expect to participate in the division of that reward?

A. Yes, sir.

Q. Which will come through the hands of your attorney, Mr. Murdock?

A. Yes, sir.

Q. And from which you expect to receive your proper share?

A. Yes, sir.

Q. And that is your claim as so founded?

A. Yes, sir.

Q. Now, Mr. McGowan, I wish to call your attention to the applications for permits filed by you, these respective applications with Government's Exhibits L, J, N, and O, to which I will now call your attention. There is no doubt that you did sign those applications, of course?

A. No, sir.

Q. When you made out these applications and addressed them to the Federal Prohibition Administrator at Washington, D. C., you represented yourself as being in the business of manufacturer and bottler at Bagel's Brewery, later called the

231 McGowan Brewery—I show you the applications, and you may look at them—take Government's Exhibit I, you say, now engaged or intending to engage as manufacturer and bottler; that is correct, isn't it?

A. Well, I never made them out. I just signed them.

Q. I will come to that. I just asked you if you did make such application as shown in this application that I refer to you?

A. I never made them out.

Q. I asked you whether or not you signed this application?

A. Yes, sir.

Q. That is your signature?

A. Yes, sir.



Q. And state whether or not you swore to it?

A. Yes, sir.

Q. And you swore to the truth of that?

A. Yes, sir.

Q. You read it, of course?

A. Yes, sir.

Q. Surely you read it before you signed it and swore to it?

A. Yes, sir.

Q. And you knew what it said distinctly, as you know the English language very well?

A. Yes, sir.

Q. Did it tell the truth; did that application tell the truth, and state the facts?

A. It did.

Q. Are all those things in here true and correct?

A. Yes, sir.

Q. That you were then engaged in the business, or about to become engaged in the business as manufacturer and bottler?

232 A. Yes, sir.

Q. That you were?

A. Yes, sir.

Q. Did you in that application say anywhere that anybody else was the real owner and manufacturer in that business?

A. No, sir.

Q. You were not the real owner or the real manufacturer, were you?

A. No.

Q. That is not true, is it?

A. The permit is true.

Q. I am not asking about that.

A. I don't know what you mean.

Q. I mean this when you said that you, Patrick F. McGowan, was the applicant, and certifying that you were then engaged, or about to be engaged, in the business of manufacturing and bottling, that was not true because you were not so engaged?

A. No.

Q. And you did not intend to become so engaged?

A. No.

Q. And you did not intend to own that business at any time?

A. No.

Q. And you did not then own it?

A. No.

Q. This application so represented, didn't it?

A. Yes.

Q. That was not true, was it?



A. No.

Q. Then you swore to something that was not true?

A. Yes, sir.

233 Q. And you knew that at that time that it was not true?

A. Yes, sir.

Q. And you knew there and then you were swearing to something that was not true?

A. Yes, sir.

Q. And in other words, you were perjuring yourself as it is designated under the law; that is correct?

A. Yes, sir.

Q. Is that the first time you committed perjury in connection with this matter which is now at issue, the Bartel's Brewery?

A. No.

Q. Had you committed perjury before that?

A. Yes, sir.

Q. May I ask when that was?

A. In regard to the other permit.

Q. No; this is the first that you made. This is February 9, 1924. This is the first one that you made.

A. Yes, sir.

Mr. GILLESPIE. I ask that the witness' answer be modified, and that it may be "no."

By Mr. GILLESPIE:

Q. You did not commit perjury before this?

A. No, sir.

Q. I show you the next Government's Exhibit J, application for permit under the National Prohibition Act, and will ask you to look at it and say if that is your signature?

A. Yes, sir.

Q. And you swore to it?

A. Yes, sir.

Q. Then that is not true any more so than the first one that I just showed you; that is untrue?

Yes, sir.

234 Q. And when you so signed and swore to it you perjured yourself?

A. Yes, sir.

Q. I show you the next Exhibit, Government's Exhibit N, application of the same character, dated December 28, 1925, and will ask you to please look at it and say whether or not you signed and swore to it?

A. I am not so sure of this one, whether I swore to that or not.

Q. Is your signature upon the application?

A. Yes, sir.



Q. To file it, it was necessary to swear to it?

A. I presume so.

Q. As it was necessary to the others which you have just identified?

A. Yes, sir.

Q. You say that you are not certain that you swore to that?

A. No, sir.

Q. Why are you not certain that you swore to it when your name is upon it and you see the name of the jurat and the notary upon it?

A. Because I can't recall who this notary is.

Q. Can't you make out his name?

A. No; I can not.

Q. Is it not James Morgan, Justice of the Peace?

A. Yes; I did.

Q. You did so sign and swear to it?

A. Yes, sir.

Q. Then the statements contained in that application that you swore to, are untrue?

A. Yes, sir.

Q. And in so swearing to it, you committed perjury?

A. Yes, sir.

235 Q. Now, I show you Government's Exhibit O, application of the same character, dated January 29, 1926, and I will ask you to look at it and tell us whether or not you signed it and swore to it?

A. Yes, sir.

Q. You signed and swore to it?

A. Yes, sir.

Q. And it is of the same character and nature as the preceding applications you made and to which you have testified?

A. Yes, sir.

Q. And in so testifying to it you swore to what was untrue?

A. Yes, sir.

Q. And you committed perjury?

A. Yes, sir.

Q. I now call your attention, Mr. McGowan, to a copy of your individual income tax return for 1924. I ask you to look at that paper [handing paper to witness]. That is your copy?

A. Yes, sir.

Q. The copy which you retained of your original income tax return for 1924?

A. Yes, sir.

Q. You signed and swore to that return, of course?

A. I believe that was signed before it was made out. That was signed in blank by me.



Q. And sworn to?

A. I swore to it afterward.

Q. After it was made out?

A. Yes, sir.

Q. Then, when you did file it, it was already signed by you, and sworn to by you as being your income tax return?

A. Yes, sir.

236 Q. Was it a correct tax of your income for that year, for the calendar year 1924?

A. No, sir.

Q. Now, calling your attention to it, I call your attention to the fact of the omission of any salary received by you during that year.

A. No, sir.

Q. There is no return of any salary received by you?

A. No, sir.

Q. Although you had received a salary?

A. Yes, sir.

Q. And there was a salary of at least \$1,800 for that year paid you by Mr. Kehoe?

A. Yes, sir.

Q. Or more?

A. About \$1,800 a year.

Q. You did not receive a Christmas present for that year, 1924?

A. 1924; yes.

Q. You did receive a Christmas present?

A. Yes, sir.

Q. In what sum?

A. \$2,000.

Q. And you did not return that in your income-tax return?

A. No, sir.

Q. Did you leave out any other items of income which you should have reported under the law, Mr. McGowan, do you recall?

A. I never made out any of those. They were made out for me. I never made any of them out. They were made out by William F. McHugh.

Q. You never saw them at all?

A. I saw them.

237 Q. When you signed and swore to them, did you see them?

A. That was not to fill them out?

Q. Regardless of that fact, they were filled out when handed to you?

A. Yes, sir.

Q. And you signed and swore to them?



A. Yes, sir.

Q. And they were untrue?

A. Yes, sir.

Q. And in so swearing you committed perjury?

A. Yes, sir.

Q. And at the same time you defrauded the Government; that is true and correct?

A. Naturally.

Q. Now, I call your attention to individual income tax return for the calendar year 1925—that is Government's Exhibit FF. Kindly look at that, Mr. McGowan; that is correct?

A. Yes, sir.

Q. That is a copy which you retained?

A. Yes.

Q. That is correct, after signing and swearing to the original income tax return and forwarding it to the proper office?

A. Yes, sir.

Q. This copy retained was in your possession until turned over to whom?

A. To Mr. Lucas.

Q. Now, I call your attention to the retained copy and I will ask you if you reported there the money you alleged to have received from John Kehoe?

A. No, sir.

Q. As manager of that brewery?

A. No, sir.

Q. Or any other income?

238 A. No, sir.

Q. Did you receive any other income during that year 1925 which is now being investigated?

A. Yes, sir—1925?

Q. Yes.

A. I got money from Mr. Kehoe time and again.

Q. Frequently, besides your salary?

A. Besides my salary.

Q. Besides your salary of \$150 per month?

A. Yes, sir.

Q. During that year do you recall what you did receive from Mr. Kehoe?

A. No; I can not.

Q. Have you any idea?

A. No; I have not.

Q. Not the slightest idea?

A. No, sir.

Q. You say you did get other amounts from him?

A. Yes, sir.



Q. May I ask you to try to think what you did get, whether \$100, or multiples of \$100, two, three, four, or five, or a thousand dollars?

A. About two or three hundred dollars, I would judge.

Q. In addition to the salary?

A. Yes, sir.

Q. You didn't report that, of course?

A. No, sir.

Q. Your salary was \$150 per month?

A. Not at that time.

Q. In 1925 it was more?

A. Yes, sir.

Q. How much?

A. About \$200.

Q. Wasn't it \$300?

339 A. That was my salary, but I was getting \$300 or \$325 to pay on a car I paid off. I paid on a car, but I had about \$200 salary.

Q. And paying for the car?

A. Yes, sir.

Q. Plus your salary?

A. No; \$325 and \$125 on a car, or \$108 on a car, I think to be exact.

Q. And total, what did you get?

A. About \$325.

Q. Altogether for the year, including the cost of the car that was paid for?

A. I couldn't say; about \$3,000.

Q. About \$3,000?

A. I would judge so.

Q. For the year 1925?

A. Yes.

Q. And that you did not report?

A. No.

Q. And you swore to the fact that you received no salary?

A. On this return?

Q. Yes.

A. No, sir.

Q. That was untrue?

A. Yes, sir.

Q. And in doing so you committed perjury and defrauded the Government to that extent?

A. Yes, sir.

Q. Mr. McGowan, I call your attention to what purports to be the original tax return made for the year 1926 for Patrick F. McGowan, and I will ask you to look at it and tell us whether that is your original income-tax return for the year 1926?



A. Yes, sir.

240 Q. I call your attention to the name, Patrick F. McGowan, at the end of that return, or at the bottom of that return, and I will ask you if that is your signature?

A. Yes, sir.

Q. State whether or not you swore to it before James Morgan, notary public?

A. Yes, sir.

Q. As appears upon the document?

A. Yes, sir.

Q. And whether or not you made any return of salary or income upon that return?

A. No.

Q. All of which was incorrect?

A. Yes.

Q. And untruthful?

A. Untruthful.

Q. And in swearing to the truthfulness of this document, this return, you committed perjury?

A. Yes, sir.

Q. And defrauded the Government to that extent?

A. Yes, sir.

The MEMBER. Are you through with these returns, that particular line of cross-examination?

Mr. GILLESPIE. That phase of it; yes, sir.

The MEMBER. Then at this time we will recess until 10:00 o'clock tomorrow morning.

(Thereupon at 4:45 p. m. a recess was taken in the above-entitled matter until 10:00 o'clock a. m., August 23, 1934.)

Hearing at Scranton, Pennsylvania, on the 22nd day of August, 1934, at 10:00 o'clock a. m.

241 PATRICK F. MCGOWAN, the witness on the stand at the time of taking of the adjournment, resumed the stand and testified further as follows:

Cross-examination (continued) by Mr. GILLESPIE:

Q. Mr. McGowan, I show you Government's Exhibit S appearing to be amended permit for manufacturing cereal beverage under the National Prohibition Act, and regulations thereof, Permit Pa-L-164, renewal, and I will ask you to look at it please, and to say if you sign that on the back. Read it first and kindly look at the back and see if that is your signature?

A. Yes.

Q. That is your name, the name of Patrick F. McGowan is in your handwriting?

A. Yes, sir.



Q. And is your signature?

A. Yes, sir.

Q. And whether or not you swore to it after you signed it, or when you signed it?

A. Yes, sir.

Q. I read to you the portion of the statement to which you swore and subscribed as follows:

"The undersigned permittee do hereby certify that I have read the foregoing permit. That I understand all of its privileges, additions and requirements; that I accept them and each of them with the understanding and with the declaration on my part that I will faithfully comply with all the laws of the United States and regulations made thereunder and all the laws of the State wherein my business is located, and the laws of any other State in which the cereal beverage traffic is carried on, and I accept all the covenants, conditions and stipulations and recitals in said permit as a part thereof, and I agree that violation thereof, or failure to keep any part thereof in full shall be ground for the revocation of this permit." Signed Patrick F. McGowan. "Sworn and subscribed to before me this 11th day of June, 1926, James Morgan, Justice of the Peace, Kingston, Pennsylvania. My Commission expires January 1, 1932."

And the seal of the Justice is attached thereto.

Now, in making that affidavit, Mr. McGowan, you knew that was not true and correct?

A. Yes.

Q. And when you made the affidavit you knew you were deceiving the Government in your application for the permit?

A. Yes.

Q. And you had no intention of observing and obeying the Prohibition Laws referred to therein, had you at that time?

A. No.

Q. You intended to violate them of course?

A. Under the instructions—

Q. I did not ask you that.

A. Yes.

Mr. GILLESPIE. I ask that the answer be stricken, if your Honor please.

Mr. LEMING. Now, if your Honor please—

The MEMBER. The motion will be denied.

By Mr. GILLESPIE:

Q. And you sworn you would observe and you would obey the laws of the State and the United States in relation to the sale of these beverage articles?



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A. Yes.

Q. And you would not sell any so-called high proof beer which would be in violation of law?

A. Yes.

Q. And you did violate that oath?

A. Yes.

Q. And in doing so, of course, that was in violation of your oath?

A. Yes.

Q. And you did so?

A. But it was under instructions from John Kehoe.

Q. And under the instructions from John Kehoe you violated your oath?

A. Yes.

Q. And committed perjury?

A. Yes.

Q. And you would do that for anyone under like circumstances?

A. No.

Q. Under like circumstances?

A. I would not say that, no.

Q. Why did you violate your oath?

A. Because I agreed with him in 1924 to sign all papers pertaining to the brewery on his instructions.

Q. All right; now, did he instruct you to violate your oath? And commit perjury any time it was necessary, did he say so in so many words?

A. He instructed me to sign all papers pertaining to that brewery, whether it was a violation or not.

Q. Were those his specific words?

A. Exactly.

Q. Taking what he said, do you still now say that he used those identical words you used in your answer?

A. All papers I was to sign presented to me by William F. McHugh.

Q. I will ask you again to get a specific answer, did he say to you, addressing you, "You sign all papers that may be presented to you in connection with the running of the brewery, and violate your oath and perjure yourself if necessary at any and all times in doing so," did he say that in so many words, or was that the substance?

A. It may be in substance, but I had taken it as, "You sign all papers pertaining to running of that plant presented to you by William F. McHugh."

Q. And sign anything and everything?

A. Exactly.



Q. Regardless of what it was?

A. Yes, sir.

Q. Even to charging somebody else with being the violator instead of yourself?

A. No.

Q. You perjured yourself in any and every respect, did he tell you that?

A. That was left entirely up to me.

Q. Then it was to be according to your own discretion?

A. Yes, sir.

Q. And your own judgment?

A. Yes, sir.

Q. And you used your own judgment and discretion in signing and swearing to this obligation?

A. Yes.

Q. You used your own judgment and discretion in doing so?

A. Yes.

245 Q. And John Kehoe's judgment or discretion in doing so?

A. Under his orders.

Q. But you say you did it according to your judgment and discretion, you said that, that is correct and true?

A. Yes.

Q. Absolutely true?

A. Yes.

Q. Mr. McGowan, you testified on yesterday or perhaps the day before about going to attorney Evan C. Jones' office at Wilkes-Barre the evening before the time set for the revocation hearing?

A. Yes.

Q. The revocation hearing involving the permit for the Bartel's Brewery?

A. Yes.

Q. Now, you said you had a talk with Mr. Kehoe with reference to going down to see Attorney Jones, who was to act as your attorney?

A. Yes.

Q. At the revocation hearing on the next day, that is correct, if I recall what you said?

A. Yes; but I talked to Mr. Kehoe.

Q. I said you did.

A. But I would not say that evening.

Q. I didn't say that evening, Mr. McGowan, but you had a talk with him?

A. Yes.



Q. And in pursuance of that talk you went to Evan C. Jones' office in Wilkes-Barre on the evening preceding the revocation hearing?

A. Yes.

Q. Mr. McHugh went with you, I think you said?

A. No.

Q. What was it you said?

A. I met Mr. McHugh there.

246 Q. He and you then talked over while you were there, I suppose?

A. Yes.

Q. And Mr. Jones was there too, Evan C. Jones, you and Mr. McHugh and Evan C. Jones, the attorney?

A. Mr. McHugh had taken me into Mr. Evan C. Jones' office, the three of us were there.

Q. Just the three of you?

A. Yes.

Q. And nobody else?

A. No.

Q. Now, then the next day which was December 19, 1924—I am referring to the official report.

A. That is all right.

Q. You did appear in response to a citation before Joseph W. Shannon who was legal adviser of the Prohibition Director, and before whom the hearing was had?

A. Yes.

Q. That is correct?

A. Yes.

Q. In the Post Office Building at Wilkes-Barre?

A. Yes.

Q. Now, at that hearing Evan C. Jones appeared for you and represented you as counsel?

A. Yes.

Q. But I assume that you did not pay him?

A. No.

Q. That is true?

A. Yes.

Q. He was your only counsel there?

A. Yes.

Q. In the proceedings you may recall me sitting there with Mr. McHugh?

A. Yes, sir.

247 Q. I had just come from the hospital after being an invalid for over a year, and I did not take any part in the proceedings?



A. Not to my knowledge.

Q. Mr. Evan C. Jones as a matter of courtesy put my name down—

Mr. LEMING. Now, if you want to testify, that is all right.

Mr. GILLESPIE. May I say this for the record, and I do not think Mr. Leming as a brother attorney will deny me the right to say this for the record, it happened that I had been an invalid for a year in the hospital, and was just out of the hospital, and at that time I went down with Mr. McHugh and Mr. Jones as a matter of courtesy put my name down, and I took no part in the proceedings.

By Mr. GILLESPIE:

Q. You never consulted me in your life about your business?

A. No.

Q. Referring now again, Mr. McGowan, to the transcript of the testimony taken before Joseph W. Shannon, legal adviser of the Prohibition Director at the revocation hearing in the Post Office Building on December 19 and 20th, 1924, in Wilkes-Barre, Pennsylvania, the hearing about which we are talking, now you were sworn there in your own behalf?

A. Yes.

Q. At the beginning of the proceeding?

A. Yes.

Mr. LEMING. I would just like for the record to show that the official record that you have is the one produced here under subpoena, and which the Department of Justice turned over to me for delivery.

248 Mr. GILLESPIE. Correct.

By Mr. GILLESPIE:

Q. Now, you were called as a witness in your own behalf and sworn and testified?

A. Yes.

Q. That is correct?

A. Yes; that is correct.

Q. Now, I will read you certain questions asked you and answers given by you from this official record, appearing on page 120 of the transcript of the testimony taken at that time at that hearing, appearing in the following questions and answers thereto:

Q. By Mr. Jones. Since the 18th day of June 1924, you have been in charge of this brewery? A. Yes."

Did you so testify to the best of your recollection?

A. I believe I did.

Q. "Q. Since that time has the Bartel's Brewery had anything to do with that brewery? No."



Did you so testify to the best of your recollection?

A. I guess I did.

Q. "Q. Who is your brew master? A. Carl Bossart."

Did you so testify?

A. I guess I did.

Q. "Q. Who is your manager? A. Carl Bossart."

Did you so testify?

A. No; I don't recollect that.

Q. Well, to the best of your recollection?

A. I can not recall that I did. I knew he was not my manager because he was hired and employed as a brew master.

Q. Aside from that, I am merely referring to the questions and answers, and ask you if you so testified to the best of your recollection?

A. I can not recall if I did.

Q. I show you the official record containing that question and answer just read to you. "Q. Who is your manager?—A. Carl Bossart." Does that refresh your recollection?

A. Yes.

Q. Regardless of the truth of it, you did so testify?

A. Perhaps I did.

Q. You will not deny that you so testified?

A. I testified; yes.

Q. He has been your manager ever since you took it over?

A. Yes.

To the best of your recollection did you so testify?

A. According to the record there, but Mr. Bossart was never the manager.

Q. Regardless of the truth of the matter, I am asking you if to the best of your recollection you so testified?

A. I guess so; yes.

Q. Referring to page 121 of this same official record, and reading therefrom the following questions and answers appearing to be the testimony of Patrick F. McGowan given at that time:

"Q. During the time you have operated that brewery, have you shipped any beer out which went over the railroad?—A. No, sir."

Did you so testify regardless of the truth of it?

A. Yes.

Q. "Q. Have you sold any beer over one-half of 1 per cent alcoholic content?—A. No."

Did you so testify to the best of your recollection?

A. Yes.

Q. And did you not answer, reply to the question, "Has any beer been sold on the premises or has any beer gone out of the premises in violation of law?—A. No." Did you so testify?



A. I guess I did.

Q. "Q. Have you tried at all times to conduct that brewery in accordance with the terms of your permit and the Prohibition Law?—A. Yes, sir." Did you so testify?

A. Yes.

Q. When you so testified in response to those questions as appears in the official record, you did not testify to the truth?

A. No.

Q. And you knew you were not testifying the truth?

A. No.

Q. And you knew you were deceiving the Government in so testifying?

A. Yes.

Q. And you knew that you were perjuring yourself in so testifying?

A. Yes.

Q. And that is a fact, you did commit perjury in answering each and every one of the questions addressed to you and answered by you as put before you now?

A. Yes.

Q. That is true and correct?

A. Yes.

Q. Mr. McGowan, I show you a paper which I have just shown to Mr. Lepting, Government's counsel, and will ask you to read it. [Handing paper to witness.] You have read the paper through Mr. McGowan?

A. Yes.

Mr. GILLESPIE. I will ask that this paper be marked as 25N Petitioner's Exhibit for identification.

The MEMBER. It will be marked for identification as "Petitioner's Exhibit No. 2."

(The document referred to was thereupon marked "Petitioner's Exhibit No. 2" for identification.)

By Mr. GILLESPIE:

Q. I again show you the same paper, Mr. McGowan, which you have just read, marked by the Clerk for identification as "Petitioner's Exhibit No. 2," and will ask you whether you have read that paper through entirely?

A. Thoroughly.

Q. Now, I would ask you to look at the name Patrick F. McGowan at the end, and I will ask you to state whether or not that is your signature?

A. Mr. Gillespie—

Mr. GILLESPIE. Pardon me, if your Honor please, I think I am entitled to an answer to my question.



Mr. LEMING. You asked him if that is his signature.

The MEMBER. Have you examined the paper?

The WITNESS. Yes.

Mr. GILLESPIE. He has read it word for word.

The WITNESS. Yes.

By Mr. GILLESPIE:

Q. Now, I am referring you to the name Patrick F. McGowan.

A. What was your question?

Q. I asked you to look at the name of Patrick F. McGowan at the end and state if that is your signature. The answer to the question is yes or no, or you do not know?

252 A. I will answer that question providing I can explain the conditions surrounding this paper.

Q. As far as counsel is concerned, you may explain it.

A. Yes.

Q. I asked you if that is your signature?

A. Yes.

Mr. LEMING. He said it was.

Mr. GILLESPIE. I know he did, but I want to make my record clear.

By Mr. GILLESPIE:

Q. Whether or not you swore to that paper?

A. Yes.

Q. I will show you the paper again, and ask you to look at the jurat and what purports to be the seal of the Justice of the Peace in the left-hand corner?

A. Yes.

Q. Your answer is "yes"?

A. Yes.

Q. Now, I wish to ask you about the contents of this paper, the paper reading as follows:

"Personally appeared before me, James Morgan, Notary Public at Kingston, Pennsylvania, Patrick F. McGowan, residing at 92 McCarragher, Wilkes-Barre, Pennsylvania, who, being duly sworn according to law, deposed and says he was the sole lessee of the premises and property known as the Bartel Brewing Company, Edwardsville, Lucerne County, Pennsylvania, under the terms of a lease dated February 9, 1924, and which expired December 31, 1926. Also he was the sole owner and sole manager of the brewing business conducted and operated upon said premises during that period for the manufacturing and sale of near-  
253 beer under permit issued by the Federal Prohibition Director and known as Pa-L-164. Further, no other person or persons were directly or indirectly interested financially in



the ownership, management, or operation of said brewing business during said period."

Now, that is the full recital in the affidavit?

A. Yes.

Q. Was that true when you signed it and swore to it?

A. Yes.

Q. Was that information true and correct as set forth in the affidavit I have just read?

A. No.

Q. That is what I asked you and that is what you said, no?

A. No.

Q. When you made the affidavit, you knew, of course, the contents of the affidavit were not true and correct?

A. Yes.

Q. You knew they were false?

A. Yes.

Q. Now, when you did make this affidavit you took it to James Morgan, a notary public in Kingston, Pennsylvania; you took the paper over to that office?

A. Yes.

Q. And in his office some distance away from the brewery you signed and swore to it?

A. Yes.

Q. That is true and correct?

A. Yes.

Q. You went over there alone?

A. Yes.

254 Q. Now, referring to this affidavit, Mr. McGowan, and all the other papers offered as exhibits by the Government in this hearing and in this proceeding thus far, and signed by you, or signed and sworn to by you, they were given to you by some other person, and not made up by yourself, I understood you to so testify?

A. That is correct.

Q. Did Mr. McHugh give you all these papers to sign?

A. Yes.

Q. That is correct?

A. Yes.

Q. Now, do you wish to say that every single paper so far offered in evidence and shown to you, bearing your signature, or sworn to by you, were so signed and sworn to, whether true or false by the express direction of Mr. Kehoe?

A. Yes.

Q. By his express direction?

A. Yes.

Q. As to each and every individual paper?



A. Yes.

Q. They were not signed in his presence, of course?

A. No.

Q. All in his absence?

A. Yes.

Q. Do you mean to say that he knew about issuing every single individual paper you signed, before you signed it, or had seen and read it before you signed it?

A. I don't know about him reading it.

Q. Or seeing it?

A. Or seeing it; I don't know about that.

Q. Then you will not say you signed each and every one  
255 of these papers so shown to you and produced here, and sworn to by you, specifically and individually were instructed by Mr. Kehoe to be signed?

A. My instructions were to sign all papers presented to me by William F. McHugh.

Q. You have so testified on several occasions, but I am now asking you the specific question and requiring a specific answer. I will ask that the question be read.

Mr. LEMING. If your Honor please, that has been pursued a long time, and I think that the witness has answered it over and over again as well as he can, and I submit that it is so repetitious that the question is objectionable.

The MEMBER. The objection will be denied.

By Mr. GILLESPIE:

Q. All of these papers were handed to you personally by Mr. McHugh?

A. Yes.

Q. None in the presence of Mr. Kehoe?

A. No.

Q. As far as you know, none of them had been seen by Mr. Kehoe at any time before they were handed to you?

A. No; not to my knowledge.

Q. Before they were signed and sworn to?

A. No.

The MEMBER. Did you read the date on that application, Mr. Gillespie?

Mr. GILLESPIE. The date on which it was sworn to was January 25, 1927. I now offer this in evidence.

The MEMBER. Any objection?

Mr. LEMING. The witness asked originally if he could  
256 make an explanation. If he is expected to make the explanation, I do not know just yet when that is to go in. I do know that the witness on the record asked to be permitted to make an explanation about that document.



Mr. GILLESPIE. We have no objection to him making an explanation in response to that question. We are through.

The MEMBER. You may ask him.

By Mr. LEMING:

Q. Mr. McGowan, you stated when that document was first presented to you, you asked if you could make an explanation about it. Now, do you want to make an explanation about it?

A. Yes.

Mr. LEMING. All right, proceed.

Mr. GILLESPIE. No objection.

The WITNESS. That paper was the only paper that I ever objected to signing from the time I took over the plant until the time I closed it, and that paper was signed under a threat; not that paper, but a paper of similar kind and character was handed to me by William F. McHugh, and when I looked it over and read it, that was the first time that he and I ever had any words. I deliberately tore it up. Two or three days after I got in touch with Mr. Kehoe at his home in Harding. I talked it over with him and during the conversation he said to me, "There is no harm in this. I have a lot of political enemies. The newspapers are writing things about the place, and I want to have it so I can put it under their nose." I came back home, and I cannot recall whether it was a week or two weeks later I signed that paper, because when I refused to sign it, William F. McHugh said to me, "It is just too bad if you do not." That was the first tilt we had between us from the starting of the plant until we closed.

The MEMBER. Anything further?

Mr. LEMING. The pending matter is the offer of the document in evidence. I was going to add that there was no objection. The pending matter was the offer, and I have no objection to the offer.

The MEMBER. It will be admitted and marked "Petitioner's Exhibit 2."

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 2," and made a part of this record.)

Mr. GILLESPIE. The petitioner is through with the witness, Mr. Leming.

The MEMBER. Anything further?

Mr. LEMING. Yes; your Honor.

•Redirect examination by Mr. LEMING:

Q. You mentioned Mr. Kehoe in connection with Petitioner's Exhibit No. 2. What Mr. Kehoe was that?

A. Mr. John Kehoe.

Q. How did he get in touch with you about that matter?



A. I went to see him about the matter.

Q. Where was this document written that you signed, that affidavit there?

A. I don't know.

Q. I believe you stated you had torn one up?

A. Yes.

Q. So that from what source did you get this one that you did sign?

258 A. It was presented to me by William F. McHugh, who presented the one I tore up.

Q. Mr. McGowan, were you familiar with the income-tax law of 1924, which describes the classes of persons who are required to file income-tax returns?

A. No.

Q. Did you ever read the law?

A. No.

Q. Do you know what the law of 1924 prescribed as to the amount of income an individual should have before being required to file an income-tax return?

A. No.

Q. Did you ever read the law?

A. No.

Q. Were you a married man in 1924?

A. Yes.

Q. Were there any other persons living with you who were dependent upon you for support in the year 1924?

A. Yes.

Q. How many?

A. Four.

Q. Did they derive their support from you?

A. That is, including myself, four others.

Q. Three others you say besides yourself?

A. Yes, sir.

Q. Did they derive their whole support from you?

A. Yes.

Q. Are you familiar with the law applicable to the year 1925 which defines the class of persons who are required to file income-tax returns?

A. No.

259 Q. Did you know what the law required in the year 1925 as to the amount of income one should have before being required to file an income-tax return?

A. No.

Q. Were you a married man in the year 1925?

A. Yes.

Q. Was your wife living with you?



A. Yes.

Q. Were there any other persons living with you whom you supported?

A. Yes.

Q. Did they derive their entire support from you?

A. Yes.

Q. And, I will ask you as to the year 1926 and as to the year 1927, were you familiar with the laws prescribing the class of persons who were required to file Federal income-tax returns?

A. No.

Q. Were you familiar with the requirements of the law as to the amount of income one should have to necessitate the filing of an income tax return?

A. No.

Q. In the year 1926 were you a married man?

A. Yes.

Q. And was your wife living with you?

A. Yes.

Q. And were there other persons living with you who derived their support from you?

A. Yes.

Q. How many?

A. Three.

Q. And did that same situation exist in 1927?

A. Yes; up until the present time.

Q. Counsel asked you with respect to those income-tax returns, whether or not you had defrauded the Government, and your answer was "yes." Did you mean in respect of your own individual income?

A. No.

Q. What income were you talking about.

A. The income tax that was filed pertaining to the operation of the brewery.

Q. Did those income-tax returns pertain only to the operation of the brewery?

A. Yes.

Q. And did you answer yes in response to the defrauding question because you knew those returns had not reported all the income of the brewery?

A. Yes.

Q. Did you furnish any data of any kind which went into the preparation of those income-tax returns?

A. No.

Q. Do you know whether or not as a matter of personal knowledge that the books of the brewery from which those income-tax returns are said to have been made up show any payments of money to you?



A. I don't know.

Q. By the way, you mentioned something about the meeting in Mr. Gillespie's, meeting with John Kehoe and I believe George Buss. Am I correct in that?

A. Yes.

Q. Do you remember what year that was in?

A. No; I can't recall now.

Q. And is that the Mr. Gillespie at the counsel table?

A. Yes. I do not say Mr. Gillespie was there. Mr. Gillespie was not there, but Mr. Buss and Mr. John Kehoe.

It was his office. He was mayor of Pittston at that time.

Q. So the meeting was in the mayor's office?

A. Yes.

Q. And Mr. Gillespie was the mayor at that time?

A. Yes.

Q. It was not in Mr. Gillespie's private office?

A. No; it was the sitting room, I believe. It was not his private office.

Q. I just wanted to get that clear.

A. No.

Q. Now, Mr. Gillespie has asked you at considerable length about these applications for permits, and as to whether or not you committed perjury when you signed them. Didn't you know at the time you signed them that is the reason you were signing them?

A. Yes.

Mr. GILLESPIE. Just a moment. This is cross-examination of his own witness, and I object to it, and I object to an answer to such a question.

The MEMBER. Objection will be overruled.

Mr. GILLESPIE. Exception.

The MEMBER. Exception will be noted.

By Mr. LEMING:

Q. Was it ever intended at any time in your arrangement with Mr. Kehoe that you were to be the real party in interest?

A. No.

Q. Who was to be the real party in interest at the time you signed each of those documents?

A. Mr. Kehoe, Mr. John Kehoe.

Q. And was there a change in that situation from the time you started in with him in February, 1924, until you concluded your services there about the 1st of March 1927?

A. What is that date?

Mr. LEMING. Please read the question.

(Thereupon the reporter read the pending question.)



Mr. LEMING. Maybe I had better withdraw the question. It is a little too long.

By Mr. LEMING:

Q. Was there any change in your status as an employee of Mr. Kehoe at any time between his first employment of you in February 1924 to the time that you quit in the early spring of 1927?

A. I will answer that; there was no change from the day I signed the lease on February 9, 1924, up until the time that I destroyed the beer February 28, 1927.

Q. There was a change in salary, and otherwise than a change in salary.

A. Exactly.

Q. Mr. Gillespie has asked you a question I believe as to whether or not you hoped to get a reward for testifying, and I think that your answer was "yes." I don't recall exactly. Will you state whether it was or not?

A. I believe it was.

Q. Did I ever promise you a reward for your testimony?

A. No.

Q. Did Mr. Lucas ever promise you a reward for your testimony.

A. No.

Q. Did any other Government officer ever promise you a reward for your testimony?

A. No.

263 Q. Do you have any agreement at all with the United States under which you are to be paid any reward?

A. No.

Q. Then there is in existence no contract between you and the United States whereby you are to receive anything, is there?

A. No.

Q. Did you ever ask any officer of the United States to make any such contract with you?

A. No.

Q. And do you know whether or not you will receive any reward?

A. No.

Q. Do you know anything in the law which requires that you be paid a reward?

A. No.

Q. Regardless of whether or not you perjured yourself when you signed these applications for permits, have you told the truth in your testimony before your Honor?

A. Yes.



Q. And you have answered truthfully, as far as you are able, the questions of counsel upon cross examination?

A. Yes.

Q. And questions of counsel for the Government upon direct examination?

A. Yes.

Q. Counsel for the petitioner asked you a good many questions in very rapid-fire order about getting even with John Kehoe. I believe you said that you had never made any threats against Mr. Kehoe; is that right?

A. Yes, sir.

Q. Did you ever harm Mr. Kehoe?

A. No.

264 Q. Did you ever interfere with his business in any way?

A. No.

Q. Did you ever take any action outside of making these disclosures to the United States Government?

A. No.

Mr. LEMING. That is all.

Mr. GILLESPIE. If your Honor please, may I ask the indulgence of your Honor to permit associate counsel, Mr. O'Hara, of Washington, who specializes on this particular matter of income tax, to cross examine the witness as to his income tax, affecting the answers he has given?

Mr. LEMING. That is quite all right.

The MEMBER. Very well.

Recross examination by Mr. O'HARA:

Q. Mr. McGowan, on direct examination you testified with respect to salary payments you received in each of these years, did you not?

A. Yes.

Q. You testified, I believe, that commencing February 9th and until July 9th your remuneration was about \$150 a month?

A. Yes; about that.

Q. That would be four months, would it not, the payments to you—March, April, May, and June?

A. I think it would be six months.

Q. You testified, as I recall it, and if you recall it, you can confirm me, was that your first payment after the permit had been issued was at the increased rate of \$200 a month?

265 A. I never got a check. I was always paid in cash.

Q. Rather, the first monthly payment after the issuance of the permit?

A. Yes.

Q. If that is true, the permit was issued in June, and you received it about the 2nd of July?



A. Well, I can't recall just when the permit was issued. I think it was July. I am not keen on that.

Mr. LEMING. That is the first permit?

Mr. O'HARA. The first permit in 1924.

Mr. WHITE. It was June 18th, 1924.

The WITNESS. When I received it, it was in July, about the 3rd of July, from Mr. Buss.

By Mr. O'HARA:

Q. It is a fact, however, the first monthly payment to you after the permit was issued was at the increased rate of \$200 a month?

A. About that; yes.

Q. Now, about the month of September, you testified that an automobile was purchased and that your monthly payments were increased then to \$325 a month?

A. Yes; something about that. The payment of the car was \$1,775, to be exact, and there was \$102.25 paid. It was financed by the Travis Finance Company, and I received between \$308 and \$325. I said \$325 in my testimony. I want to be sure.

Q. You accompanied Mr. McHugh, you testified, when this car was purchased. I believe in September, and you stated that a down payment was made at that time. Do you recall the amount of that down payment?

A. I have not seen the down payment, but Mr. McHugh, the morning we went to Mr. Davis' salesroom, said there was \$600 on a down payment. In fact, I had not seen the money at all.

266 Q. But you would have known the amount of the down payment by reason of the number of monthly payments that you had to make, the installment payments?

A. Yes; it was about \$600.

Q. So your installment payments, that being so, the cost of the car, according to your statement, being \$1,775, and finance charges of approximately \$100, would make \$1,875, and if there was a down payment of \$600, there would be a balance due of approximately \$1,275?

A. Yes.

Q. So that if you were paying \$102 a month, or thereabouts, these payments would continue for a period of 12 months?

A. About that; yes.

Q. So that would be about right?

A. Yes.

Q. Now the title to that car was taken in your name?

A. Yes.

Q. And you had exclusive use of the car?

A. Yes.

Q. It was in fact your car?

A. Yes, sir.



Q. And your recollection is that was about the month of September 1924?

A. Yes; about that time. I do not know the date just exactly.

Q. I thought you had testified that it was in the month of September 1924?

A. Well, about that time, if I can recall.

Q. And I think you have testified the trouble at the brewery was in the month of September 1924?

A. Well, about that time.

267 Q. And you were away on a trip at that time?

A. Yes.

Q. And you had the automobile at that time when you took this trip?

A. No; because I did not have a driver's license at that time. I had to wait a couple of weeks until I got a driver's license. I just can't recall. I was away at that time, but I had no car.

Q. You would place the purchase of the car about the month of September?

A. Yes.

Q. So that your monthly payments starting with October would have been at the increased rate of about \$325?

A. About that; yes.

Q. I think that you testified too you received a payment in the nature of a bonus about Christmas, 1924, of \$2,000?

A. Yes.

Mr. LEMING. Now, if I may make a little correction as to that, the witness testified he received a Christmas gift. You may call it a bonus, but his testimony was that it was a Christmas gift.

By Mr. O'HARA:

Q. Your testimony was to the effect that \$2,000 was given to you by John Kehoe, did you not?

A. Yes.

Q. You had no relationship with John Kehoe, other than your alleged relationship you testified to, this contract of employment?

A. No.

Q. Was there any reason why John Kehoe should have given you \$2,000 other than the fact that you were in his employ as you allege?

A. No.

268 Q. Did you consider the receipt of this \$2,000 as an incident to your employment?

A. Yes.

Q. In other words, then, you considered it as additional compensation growing out of your employment, didn't you?

A. Yes; for my services.



Q. Now, you have testified, too, that aside from this \$2,000, from time to time other payments were made to you?

A. Yes.

Q. I think you testified they were made to you by Mr. Kehoe or Mr. McHugh?

A. Yes.

Q. Were these payments substantial; by that I mean, would they be as much as \$500 or \$1,000?

A. I can't recall that. I got money from Mr. Kehoe at times to go away on, to go to Atlantic City, to get away from the brewery. I spent weeks, sometimes two weeks and sometimes three weeks.

Q. Now, Mr. McGowan, you have testified that about Christmas 1924, Mr. Kehoe gave you \$2,000?

A. Yes.

Q. Perhaps I have already asked you this, but you have testified that you got an additional \$2,000 in 1924?

A. Yes.

Q. Your employment contract in 1925 was satisfactory to Mr. Kehoe so far as you know?

A. Yes, sir.

Q. And did you get as much as \$2,000 in 1925 over and above this salary?

A. I can't recall that. The money that I got from Mr. Kehoe outside of my salary was given to me in the interest of the operation and the expense of the brewery.

269 Q. I understand that.

A. It had nothing to do whatever with my salary or my income. It was to get away and stay away at the expense of the brewery while it was operating.

Q. You used the money?

A. Yes. Mr. Kehoe's instructions were to get out of town, spend it as I please, and where I pleased, in the interest of the brewery.

Q. You did not buy supplies for the brewery or anything of that sort?

A. No.

Q. You did not make any contacts relating to the business of the brewery on which you spent this money?

A. No; I made no contact, but I had revenue men sometimes following me, and I kept them going around in the interest of the brewery.

Q. You spent this money, however?

A. Yes.

Q. You spent this money to cover your personal expenses?

A. I spent this money to cover person expenses in regard to work for the brewery.



Q. I would like to have you give an approximation of the amount given you aside from your salary in 1925, was it as much as \$2,000?

A. I couldn't recall that.

Q. Was it as low as \$200?

A. It may be. I can't recall what I spent in the interest of that plant.

Q. It might have been more than \$1,000?

A. That is true.

Q. It might have been more than \$1,500?

A. I can't say that. I can't recall.

Q. It might have been more than \$1,000?

270 A. It might have been; yes.

Q. Was the same thing true of 1926?

A. Yes.

Q. I show you Respondent's Exhibit EE which is your retained copy of this 1924 return. I also show you Respondent's Exhibit FF, which is your retained copy of the 1925 return, and Exhibit HH, which is your retained copy of the 1926 return.

A. Yes.

Q. Now, appearing on the 1924 return is an item of \$274.56, income from business or profession. Was that supposed to represent the income from the brewery operation?

A. That I can't tell. I never saw that until the close of the brewery in 1927 when they were turned over to me by William F. McHugh, outside of signing my signature and getting the affidavit.

Q. To refresh your recollection, you have not the original of this return?

A. No.

Q. You signed the original of those returns?

A. Yes, sir.

Q. I show you Schedule A gross income and various deductions; now, would that have represented anything else except your wages and income from the brewery?

A. I could not explain them. I know nothing whatever about that outside of swearing to that and signing it.

Q. I show you Respondent's Exhibit FF, which shows in red, net loss from business, \$82,325.97. Do you recall whether that was supposed to represent loss from the brewery operation?

A. I don't know.

Q. To refresh your recollection, I show you Schedule  
271 A of this Exhibit, where, under the heading, "Total Receipts from Business," is written manufacture cereal beverages. Is your recollection refreshed to the extent that you do now recall that is what that was supposed to represent?

A. I know nothing at all about that.



Mr. LEMING. I want to ask if counsel is still examining as to his individual income?

Mr. O'HARA. We are, your Honor.

The MEMBER. Are you objecting, Mr. Leming?

Mr. LEMING. I do object to these particular questions. I do not see the relevancy between them and his individual income.

The MEMBER. It seems to me it is relevant. Your objection will be overruled.

Mr. O'HARA. Read the question.

(Thereupon the reporter read the pending question as follows:)

"Q. To refresh your recollection, I show you Schedule A of this Exhibit, where, under the heading, 'Total Receipts from Business,' is written manufacture cereal beverages. Is your recollection refreshed to the extent that you do now recall that is what that was supposed to represent?"

The WITNESS. No; I answered "no."

By Mr. O'HARA:

Q. To simplify and shorten the proceedings, I will ask you this question, did you individually have any business from which you might have an income, or from which you might have sustained a loss?

A. No.

Q. Is it true that your sole source of income was under this alleged employment contract with John Kehoe?

272 A. Yes.

Q. It is a fact that any loss shown in these returns from the operation of this alleged business that you were connected with was improperly shown in the return?

A. Yes.

Q. Now, did you sign the original of this 1924 return of which this is a duplicate?

A. Yes.

Q. Did you in signing that return read the instructions which are part of the return?

A. No.

Q. Did you see them?

A. No.

Mr. LEMING. Your Honor, I submit this is going right over the same field that has been over time and time again, and I object to the question as highly repetitious.

The MEMBER. I think there is probably something to that. I am not disposed to interfere with either side making their case so long as they are reasonable about it.

Mr. O'HARA. If I may make a statement in that regard, Mr. Leming elicited from this witness on direct examination that he had not read the law and did not know how much income he



should have before he filed a return, and I am showing the witness the document that he signed, and a part of that document consists of these instructions.

The MEMBER. That is perfectly proper, go ahead.

By Mr. O'HARA:

Q. You have said, have you not, you did not read any of these instructions?

A. No.

273 Q. Either in the signing of the 1924 return or the 1925 return, or the 1926 return?

A. No.

Q. Still you did sign and swear to these returns?

A. Yes.

Q. You testified that during the year 1924, and at the end of that year, you were married and living with your wife?

A. Yes.

Q. You testified to certain dependents that you had, how many?

A. Three.

Q. Will you specify who those dependents were?

A. My wife, my baby, and my mother-in-law.

Q. Your wife was included among the three dependents?

A. Yes.

Q. Now, as to 1925 did you have any further dependents?

A. Yes.

Q. Who was the further dependent?

A. My wife, my baby, and my mother-in-law.

Q. I mean you had the same number?

A. The same number.

Q. In 1926 you had the same number of dependents?

A. I just can not recall whether my baby was dead at that time, my baby boy. I just can not recall exactly the date. Yes; I had the same, my wife, my baby, and my mother-in-law.

Q. Of course, your baby was naturally and entirely dependent upon you for support?

A. Yes.

Q. Was your mother-in-law dependent upon you entirely for support?

274 A. Yes; she was to a certain extent. She had a son, and sometimes he was there, and sometimes he was not.

Q. Did her son make his home with her as well?

A. Yes.

Q. Did your mother-in-law have any income, Mr. McGowan?

A. No.

Q. If you know, will you state whether her son, who made his home there had any income?

A. No; outside of his day's work when he was at work.



Q. You testified that your mother-in-law owned this home?

A. Yes.

Q. When did she acquire that home?

A. I believe in 1925.

Q. Do you know where she got the money?

A. She got \$2,000 off of me to pay for it. The home was bought for me by John J. Cuff, Shenandoah, Pennsylvania, with the understanding that sometime I may be able to pay it back.

Q. The title was taken in your mother-in-law's name?

A. No; the title was taken in Mr. Cuff's name. I have the deed here.

Q. I am not interested in them.

A. Mr. Cuff bought the property through Mr. Dill, an attorney at Wilkes-Barre, and there was a mortgage on it, and he carried the mortgage and paid the interest on it.

Q. Do you know the cost of the house?

A. About \$4,500.

Q. How much was paid down?

A. Mr. Cuff paid down \$2,000.

Q. Was that the \$2,000 you testified to in your direct examination?

275 A. It was not paid down then. The house was bought in 1923, and when I got the money later, the latter part of 1924, I gave the money to Mr. Cuff, and that released him, and he turned the property over to my mother-in-law.

Q. The property was turned over to your mother-in-law?

A. Yes.

Q. And you made your home with her?

A. Yes.

Q. Did you pay rental for using it as your home?

A. I used it as my home.

Q. Did you pay rent or interest on any encumbrance?

A. There was a mortgage carried over of \$2,500 and I paid and helped to pay at times—I could not afford it at other times—I paid the interest on it, which was, I believe, \$150 a year.

Q. You did not pay rent to your mother-in-law?

A. No.

Q. You testified you never read the law and know of no provision of law authorizing the payment of a reward to an informer; you so testified, did you not?

A. Yes.

Q. It is true that Mr. Murdock has filed a claim for reward in his and your behalf?

A. Yes.

Q. Naturally, you were informed by Mr. Murdock that there was a provision in law entitling an informer to a reward?

A. I cannot recall that.



Mr. LEMING. I think, if your Honor please, we are departing here from proper recross. I am only suggesting this is the interest of a little expedition, and that it is all in the record.

276 The MEMBER. I think we will be through shortly.

Mr. O'HARA. If he had let the witness answer the question, we would have been through now. You have not objected to the question?

Mr. LEMING. No.

Mr. O'HARA. Will you read the question?

(The question referred to was read aloud by the Reporter as above recorded.)

The WITNESS. I cannot recall Mr. Murdock telling me about the law; I cannot recall that.

By Mr. O'HARA:

Q. Just one more question: You, of course, know that unless the law authorizes the payment of a reward, you would not be paid a reward?

A. That is true, yes.

Mr. O'HARA. That is all.

(Witness excused.)

The MEMBER. We will take a recess at this time.

(Whereupon a recess was taken.)

Whereupon KATHLEEN WALSH was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct-examination by Mr. LEMING:

Q. Where do you live, Miss Walsh?

A. 137 Broad, Pittston.

Q. Pittston, Pennsylvania?

A. Yes.

277 Q. How long have you lived there, Miss Walsh?

A. All my life.

The MEMBER. Will you speak just a little louder, please?

By Mr. LEMING:

Q. What has been your employment, Miss Walsh, during the past few years?

A. Secretary to Mr. Buss.

Q. George F. Buss?

A. Yes.

Q. How long were you his Secretary?

A. Sixteen years.

Q. Up until the time of his death?

A. Yes.



Q. When did he die?

A. August 17, 1934.

Q. What were your duties as his Secretary?

A. Bookkeeper and Stenographer; uniform tailoring business.

Q. That is, he was running the tailoring business?

A. Yes.

Q. And did he dictate to you letters and matters that he wanted written?

A. Yes.

Q. You would write them up for him?

A. Yes.

Q. Have you ever seen him sign his name?

A. Yes.

Q. A good many times over that period of years?

A. Yes.

Q. I take it, then, you are familiar with his signature?

A. Yes, I am.

278 (Mr. Leming hands paper to counsel for petitioner.)

By Mr. LEMING:

Q. I show you a receipt which bears a name "George F. Buss" and I will ask you if you know whether or not that is his signature?

A. In my opinion, it is.

Mr. LEMING. I offer the document in evidence.

Mr. GILLESPIE. No objection.

The MEMBER. What is the document, Mr. Leming?

Mr. LEMING. The document, if your Honor please, is on the letterhead of the Treasury Department, Internal Revenue Service, office of Federal Prohibition Director of Pennsylvania, dated Philadelphia, Pennsylvania, June 24, 1924, and reads:

"Received from Federal Prohibition Director, Philadelphia, Pennsylvania, Permit Pa-L-164, issued to Patrick F. McGowan, Plymouth Street and Tobys Creek, Edwardsville, Pennsylvania, under date of June 18, 1924.

"By GEORGE F. BUSS."

The MEMBER. It will be received and marked as Respondent's next exhibit.

The CLERK. Exhibit UU.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit UU," and made a part of this record.)

Mr. LEMING. You may cross-examine.

Mr. GILLESPIE. No cross-examination, sir.

Mr. LEMING. That is all, Miss Walsh.

(Witness excused.)



279 Whereupon W. G. KEATING was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mr. Keating, Have you stated your name to the Reporter?

A. I have; yes, sir.

Q. Where do you reside, Mr. Keating?

A. Scranton, Pennsylvania.

Q. How long have you lived there?

A. 25 years.

Q. How old are you?

A. 32.

Q. What is your occupation?

A. District Manager of the American Surety Company.

Q. How long have you been such?

A. Since May 1927.

Q. What was your occupation prior to that time?

A. Assistant Trust Officer of the Scranton-Lackawanna Trust Company.

Q. Was a subpoena served upon the American Surety Company to produce certain papers here at this hearing?

A. It was.

Q. Do you have a copy of that subpoena with you, which was left with you?

A. I do.

Q. Let me see it, please.

A. Yes.

Q. Were you designated to respond to this subpoena by the American Surety Company?

A. I was; yes, sir.

280 Mr. LEMING. This is a subpoena duces tecum, if your Honor please, and it is addressed in this manner?

"The President of the United States of America to the President or such competent representative as may be designated" and "To the American Surety Company, New York, N. Y."

By Mr. LEMING:

Q. You were required under the subpoena, Mr. Keating, to produce an indemnity agreement signed by John and Thomas Kehoe; is that the agreement which you produced?

A. That is the agreement produced; yes, sir.

Mr. LEMING. Will you mark this for identification, please?

The CLERK. VV for identification.

(The document referred to was thereupon marked "Respondent's Exhibit VV," for identification.)



By Mr. LEMING:

Q. Was that document that you have just produced taken from the files of the American Surety Company?

A. Yes, sir; from the files in New York City.

Q. Is that the place where such documents are customarily kept by the American Surety Company?

A. Yes, sir.

Q. Have you any personal knowledge of the document other than as you have already testified?

A. No, sir.

Mr. LEMING. I offer the document in evidence, if your Honor please.

Mr. WHITE. If the Court please, we object to the admission of the document at this time unless there is some identification of the paper as being made by the petitioner.

281 Mr. LEMING. Is the signature of the petitioner denied?

Mr. WHITE. You are asking us to testify?

Mr. LEMING. I am asking you if you deny the signature.

Mr. WHITE. That is for your proof, Mr. Leming; we submit.

Mr. LEMING. I think counsel usually have the privilege of making such inquiry so that we may know what further procedure to take. I take it the signature is not to be disputed.

The document, I believe, has already been marked for identification!

The MEMBER. It has.

Mr. LEMING. Does your Honor sustain the objection pending identification of the signature?

Mr. WHITE. We respectfully submit it is not admissible at this time, because there is no identification to associate this with the petitioner or proof of the signature alleged to be his, and the witness has testified he has no knowledge of the execution of this document other than he produced it here; that he has no personal knowledge.

Mr. LEMING. He produced it from the files of the American Surety Company, from the files where such documents are regularly and customarily kept. Personally I do not care to bother about insisting upon the admission at this time, as we will prove the signature.

The MEMBER. Under those circumstances I sustain the objection at this time.

Mr. LEMING. That is all right. We will establish the signature, if your Honor please.

(Discussion off the record.)

282 Mr. LEMING. The witness is in physical pain, your Honor, and would like to be excused.



The WITNESS. I had a surgical operation on my jaw this morning and I would like to be excused until after lunch. I think I will feel a little better then.

(There was a discussion off the record.)

Mr. GILLESPIE. No objection.

The MEMBER. You may be excused.

(Witness excused.)

Mr. LEMING. If your Honor please, Mr. Keating says he thinks he will be all right probably by 2 o'clock, or such a matter. We had some other records for him to identify. So I assume it will be appropriate to recall him.

The MEMBER. You may recall him if he is able to appear.

Mr. LEMING. Will John Kehoe take the witness stand?

Whereupon JOHN KEHOE was called as a witness by and on behalf of the respondent, and being first duly sworn, was examined and testified as follows:

7  
DIRECT EXAMINATION

Mr. LEMING. If your Honor please, may I call attention to the general rule and the accepted rule, as I know it, that when one calls his adversary, or, rather, the opposite party, he is called for cross examination and the party calling him is not to be bound by what he says, and I wish to examine this witness under that rule.

The MEMBER. Have you anything to say?

Mr. GILLESPIE. I ask that the rule be produced and the existence of the rule proven. We do not admit such a general rule as being a rule of evidence.

Mr. LEMING. I have several citations, if your Honor will bear with me just a minute so I can be rather specific.

The MEMBER. All right.

Mr. LEMING. Paragraph 857, Jones on Evidence, there begins a discussion under the caption, "Party not bound except testimony of his own witness."

Mr. GILLESPIE. What volume is that?

Mr. LEMING. Jones on Evidence, Civil Cases, Third Edition. This is the condensed edition. This is the edition published, I believe, in 1924.

Under Paragraph 858, "The rule under discussion applies with peculiar force when a party calls his adversary as his witness. It often happens that a litigant is compelled to call the adverse party to prove particular facts and it would be an intolerable rule if testimony given under such circumstances could



not be controverted. The general rule is the same although the effect of such testimony is to incidentally discredit the former witness and to tend to show that he is unworthy of belief."

Under the caption beginning at Paragraph 853 of Jones—at 855 of Jones, page 1348, being the latter part of Paragraph 855, it is said:

284 "Under the practice which now quite generally prevails, if a party is called by his adversary, he is an adverse party under statutes and these generally provide that the party calling the witness shall not be bound thereby and many of the statutes declare that the testimony may be rebutted by other testimony, as if taken in his own behalf. It is the meaning of many of these statutes that the party thus called is not called as a witness of the other party, but in order to elicit from him material facts by cross-examination as if he had already been examined on his own behalf."

Now, going to Paragraph 856, under the caption, "Other Exceptions and Qualifications of Rule," there appears the following:

"An exception to the general rule which is sanctioned by every high authority is where the witness is not one of the party's own selection but is one whom the law obliged him to call, such as a subscribing witness to a deed or will, or the like, here he can hardly be considered as the witness of the party calling him, and therefore, as it seems his character for truth and veracity."

The material part I wish to direct your Honor's attention to is the latter part of Paragraph 855 providing that under the practice now quite generally prevailing if a party is called by his adversary he is an adverse party under the statutes, and those generally provide that the party calling the witness shall not be bound thereby.

(Discussion off the record.)

Mr. WHITE. We admit the signature.

285 Mr. LEMING. If you do not mind, I will show it to him.

If your Honor please, we have dispensed with the legal difficulties for the moment.

By Mr. LEMING:

Q. I show you a document, Mr. Kehoe, which has been produced here under a subpoena duces tecum by a representative of the American Surety Company, and which is now marked for identification as "Respondent's Exhibit VV"; will you kindly examine it and state whether or not your signature appears upon it?

A. It look like it, sir.

Q. Is that the best you can say about it?



A. Well, I will tell you, my signature changes at times on account of rheumatics. I have been laid up for months and months at a time. I will not positively say it is.

Mr. LEMING. Counsel had agreed that it was and I then asked to call the witness to ask him the same question. It is true counsel did not agree of record; that is one thing; but I understood there was a remark on the record about it and I assume the Reporter got the conversation concerning that.

Mr. GILLESPIE. As one of counsel of record I wish to say I do not know whether it is Mr. Kehoe's signature or not, and I agreed that Mr. Kehoe might testify. The point raised in argument was as to the right of the Government to call the adverse party and the question was whether he would be bound or not; that is the question involved. That was dropped because we had no objection to him being called to testify as to whether it was his signature or not.

286 Mr. LEMING. It was dropped because you said after conference with your associates, you said "We will agree he signed it."

Mr. GILLESPIE. I cannot bind my colleagues as to whether they agree it is his signature or not.

Mr. LEMING. Did the Reporter get that remark—

The MEMBER. It is my understanding it was agreed with reference to the document that it should be admitted as having been executed by Mr. Kehoe.

Mr. LEMING. That was the way I understood it, and then I asked Mr. Gillespie if I could ask the witness—

Mr. GILLESPIE. As far as counsel are concerned, we believe it is his signature, but after Mr. Kehoe's answer, of course, we are not responsible for the certainty of it. But we, as counsel, are willing to say we believe it is his. That is all we can be bound by.

By Mr. LEMING:

Q. Will you kindly state again what you think of the signature?

A. As I say, I have been laid up with rheumatics, and in 1924 that year, I was very sick, and on account of my condition my signature changes from time to time. I cannot bend that finger [indicating] now. My signature will be different today than it was then or a year ago.

Q. What, then, would you say of the signature before you; would you mind stating what your present opinion about it is?

A. This one [indicating]?

Q. Yes.

287 A. I would say I cannot swear that it is, to be truthful about it.



Q. Well, would you think it might be your signature?

A. The "J" does not look like my "J," and the "K" does not look like my "K." In fact, if you see a recent signature you will find this does not correspond.

Q. Granting what you say is true, do you have any other documents you signed around about that time which you could compare it with and see if that will not refresh your recollection?

A. On February 24th—

Q. 1924.

A. That is nine years ago. I cannot say I have.

Q. You cannot say you have?

A. No.

Mr. LEMING. May I see the petition in this proceeding, please?

By the way, Mr. Kehoe, I did not ask you, but I believe you are the petitioner in this case, one of the petitioners in this proceeding here. Do you understand what I am asking you?

The WITNESS. Repeat it again, please.

By Mr. LEMING:

Q. You are one of the petitioners in this proceeding that is now being tried?

A. I believe I am.

Mr. GILLESPIE. Counsel will admit that for the record.

The WITNESS. I do not know how many petitioners there are.

By Mr. LEMING:

Q. This [indicating] is your appeal to the Board  
288 of Tax Appeals, is it not?

A. Yes.

Q. The appeal which his Honor is now hearing?

A. Yes.

Q. And in order to initiate this proceeding you had to file a petition with the Board of Tax Appeals, did you not?

A. Yes, sir.

Q. Now, the Clerk of the Board has just handed me the Board's docket file, and I call your attention to it, to that part of the file which is captioned, "John Kehoe and Mrs. John Kehoe, petitioners, vs. Commissioner of Internal Revenue, Respondent, Docket No. 64609," and right under that is the word "petition"; now, if you will examine that document, please, and state whether or not you signed it; shall I turn to the page?

A. I have signed that.

Q. That is your signature, then?

A. It is.

Q. And you swore to that petition before F. J. Kane, did you?

A. I did.



Q. Now, later on, after the filing of the petition on which you have just identified your signature, there was filed with the Board a document having this caption, "John Kehoe and Mrs. John Kehoe, Petitioners, vs. Commissioner of Internal Revenue, Respondent, Docket No. 64609," and then the word "reply"; going to the signature page of that document, will you state whether or not that is your signature?

A. It is.

Q. And you swore to that before F. J. Kane, September 27, 1932?

289 A. I did.

Q. Now, Mr. Kehoe, I will ask you to take this document again, please, Respondent's Exhibit VV for identification, being the document produced by the American Surety Company, and turning to that page on which your name appears as a signer, or, at least, where a John Kehoe name appears on the line to be signed on, I will ask you to examine that signature on this exhibit for identification VV and compare it with the two signatures you have just identified on your petition and state whether or not your recollection is refreshed as to whether or not you signed the document for identification VV?

A. I cannot swear that this is my signature.

Q. Well, will you swear it is not your signature?

A. No.

Q. Then, to put it another way, you will not swear that it is and you will not swear that it is not?

A. I have a reason. If you will look at the "J," "K," and "N," there is a distinction between them.

Q. That is the reason I asked you to compare them with the two admitted signatures.

A. That is the reason I will not admit this one, because there is a difference.

Q. The question I asked you last, Mr. Kehoe, was this: As I get your position now, it is this: You will not swear it is and you will not swear it is not; is that right?

A. Correct.

Mr. LEMING. If your Honor please, I renew my offer of the document, and the purpose of the offer is this: To show that it is the indemnity bond given to the American Surety Company, in consideration of which that company became the surety on the application for permit which was issued in the name of Patrick F. McGowan, in the year 1924.

290 Mr. GILLESPIE. If your Honor please, if the document were offered in evidence merely to show that it comes from the files of the American Surety Company, purporting to be a bond or a document of a certain character, without binding the petitioner



as to the verity or genuineness of the signature thereto, we would have no objection; but to be offered for the purpose of showing that is his signature, by his testimony it cannot be identified or admitted. The question as propounded to the witness as to the signature which he admitted on other papers does not go to the question whether he signed this or not. It might be for a jury to decide whether because of similarity it actually is or is not his signature; but that is another question. For your Honor to decide that it is and that it must therefore be admitted, is asking your Honor to do more than you are required or permitted by the law under the rules of evidence to do.

**Mr. LEMING.** If your Honor please, may I call attention—I do not recall whether it is a statutory provision, established law, authority, or what; but it is a rule quite often followed that when there is in the record a signature which is admitted to be that of a party and another document is offered, the Court itself may make the comparison and decide, if it wishes. Sometimes they do and sometimes they do not; but it is a matter of discretion.

291 **Mr. GILLESPIE.** If we are proceeding according to some statute, we must comply with the requirements of the statute. If there is a statute, it must be produced. If it is a state or federal statute, the Government must stand upon it. There is no doubt about the right of the Government to call someone to establish that it is his signature, and if it is, it may be admitted; but the question of being bound is not to be decided now, but by your Honor when he decides the whole question. I do not think the requirements as to this motion have been properly covered. I object to this being received in evidence because it has not been duly verified by the witness upon the stand; neither Mr. Leming nor I, nor anyone else is not permitted to say it is his signature because it looks like some signature which he admits to be his.

**The MEMBER.** It is the function and duty of the Board to determine the facts in the case, and the document will be admitted and marked as Respondent's next exhibit.

**Mr. GILLESPIE.** Exception.

**The CLERK.** VV.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit VV," and is made a part of this record.)

**The MEMBER.** An exception may be noted.

**Mr. LEMING.** If your Honor please, Mr. Keating had asked that we substitute a photostat for that; I do not know whether he asked that it be done forthwith; I do not think so; so a little later I will ask that a photostat be substituted for the original,



but for the time being the original may remain in the Board's records.

292 Mr. GILLESPIE. No objection.

The MEMBER. It may be so substituted.

Mr. LEMING. That is all at this time, Mr. Kehoe.

The MEMBER. Do you desire to ask any questions, Mr. Gillespie?

Mr. GILLESPIE. No, your Honor.

The MEMBER. We will recess until 2 o'clock.

(Whereupon, at 12:30 o'clock p. m., a recess was taken until 2 o'clock p. m.)

#### AFTERNOON SESSION

The Board pursuant to recess at 2:00 o'clock p. m., whereupon the following proceedings were had:

The MEMBER. You may proceed.

Thereupon HARRY KENNY was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. What is your name?

A. Harry Kenny.

Q. Where do you live, Mr. Kenny?

A. 129 Division Street, Kingston.

Q. How long have you resided there?

A. I judge 21 years.

Q. How old are you, Mr. Kenny?

A. Fifty-eight.

Q. What is your occupation?

A. Trainman on the Delaware, Lackawanna & Western Railroad for 32 years.

293 Q. Will you state the capacities that you have worked in?

A. I first started out as a trainman in December 1902, and eight years afterwards I was promoted to be a conductor on freight trains. I don't know just the exact date, or how many years afterwards I was made a passenger conductor. In three or four years I resigned as conductor to take baggage on runs between Hoboken, New Jersey, and Kingston. That position did not pay me as much as I got as conductor, but I was home every night, and out of all kinds of weather.

Q. Was that the position you were occupying in the year 1924?

A. Baggage master on that passenger train.



Q. From Kingston to Hoboken?

A. From Kingston to Hoboken, New Jersey.

Q. Were you raised down in this locality, Mr. Kenny?

A. I was born and raised in the city of Scranton.

Q. And you are at the present time employed by the railroad in the capacity you last mentioned?

A. Yes; as far as I know.

Q. You are on leave to be here today?

A. Yes.

Q. And you were subpoenaed to be here?

A. Yes.

Q. Do you know John Kehoe, Mr. Kenny?

A. Yes.

Q. How long have you known him?

A. I have known John Kehoe since the early part of 1924; personally acquainted with him.

Q. Did you have any transactions with him in 1924?

294 A. Just a little.

Q. What were they?

A. I don't know just what you mean.

Q. What kind of transactions did you have with him in 1924?

A. Well, I went to see him about buying beer.

Q. Did you buy it?

A. Not for myself; no.

Q. But you bought it for someone else?

A. Yes, sir.

Q. How much?

A. Well, I judge all the time, eight cars.

Q. Did you pay him for it?

A. Yes, sir.

Q. How did you pay him, in cash?

A. Seven times in cash, once with a check.

Q. When you went to pay him the first time, did you tender him a check or the cash?

A. I tendered him a check.

Q. What did he say about it?

A. He said take it down to the Miners Bank at Pittston, Pennsylvania, and have it cashed.

Q. Did he tell you to see any particular person at the Miners Bank?

A. Leo Reap.

Q. Did you see Mr. Reap?

A. Yes, sir.

Q. Did you get the check cashed?

A. Yes, sir.

Q. What did you do with the money?



A. Took it back to John Kehoe.

Q. How much was that, Mr. Kenny?

A. Well, that is quite awhile ago, but my recollection is around \$2,100; I am not sure.

Q. How much beer did you pay for?

295 A. 100 barrels.

Q. Where was Mr. Kehoe when you handed him the money?

A. In his office in whatever bank building it was; the Union Bank Building.

Q. Pittston, Pennsylvania?

A. Pittston, Pennsylvania; yes.

Q. Do you remember how long after that you made your next purchase from him?

A. No, sir; I could not tell.

Q. Do you have some memoranda in your own handwriting that will aid in identifying your several purchases?

A. Not in my possession; no.

Q. Did you have such memoranda?

A. Yes.

Q. What did you do with it, Mr. Kenny; did you turn it over to Special Agent Lucas?

A. No; two Federal men got hold of me and I gave it to them.

Q. Is this memorandum before you there, the memorandum in question?

A. It is my handwriting.

Q. Can you refresh your recollection from that and state how many purchases you made; how many carloads?

A. Well, let me see; about eight.

Q. And how much money did you pay him on each occasion?

A. \$2,116 and some cents.

Q. Did you pay it to John Kehoe on each occasion?

A. Yes.

Q. Now, you said there was one payment made by check; was it your check, Mr. Kenny?

296 A. No.

Q. Whose was it, if you recall?

A. Well, there were two parties I was buying it for; Wentz at Jersey City, and O'Neill at Hoboken.

Q. They were the two men you were buying the beer for?

A. Yes; O'Neill was at Hoboken, and Wentz was in Jersey City.

Q. Do you know how the beer was shipped?

A. Shipped by rail.

Q. From what point?

A. Well, I would say the Kingston railroad yard.

Q. Do you know the brewery located adjacent to those yards?



A. What is that?

Q. Is there a brewery located adjacent to those yards?

A. Well, no; I would not say it is adjacent. It must be a quarter or a half-mile away in Edwardsville.

Q. What brewery is that?

A. Well, it has been known as Bartel's brewery.

Q. Did you ever hear it called the McGowan Brewery?

A. No, sir.

Q. You always knew it as Bartel's?

A. Yes, sir; Bartel's.

Q. Now, did you have occasion to go to the bank at Pittston and get the cash on checks more than once to take back to Kehoe?

A. No; only once.

Q. Now, did you receive a commission for buying the beer from Mr. Kehoe, Mr. Kenny?

297 A. Yes, sir.

Q. And by whom was the commission paid?

A. What would you call it, the receiver, the people in Hoboken and Jersey City. They gave me the commission.

Q. How much commission would you get on each car?

A. Well, that varied on the position I was in. Sometimes \$50 and sometimes \$100.

Q. Now, on each one of these occasions that you made the purchase of a car lot of beer; or rather let me ask you this, was each one of these purchases a carload purchase?

A. Yes, sir.

Q. Can you identify the dates of the several purchases, Mr. Kinney?

A. No; I cannot. You remember this is quite awhile ago.

Q. Could you refresh your recollection from any memoranda in your handwriting?

A. You mean this slip [indicating]?

Q. Well, either one of them, will they refresh your memory?

A. This is July 21st.

Q. 1924?

A. I don't see any date on it, to tell you the truth. That part is torn off.

Q. Do you know in what year you made these purchases?

A. Yes; it was in the early part of 1924.

Q. Now, I call your attention to this memorandum which you have identified in your handwriting. Do you know when you made that up?

A. When did I do what?

Q. When did you write on that memorandum there?

298 A. Well, I cannot tell you the date or the month, but I think it was when I received those checks, when I would



receive them through the mails I would make a memorandum of them and put it on here so that it would keep me straight in case there was any loss of the contents which was shipped, or any loss of the check, I would be able to clear myself, that I was not liable for the amount of the money that was involved in the transaction.

Q. In other words, that memorandum you now have in your hand was made just about simultaneous with the transaction?

A. With the transaction; yes, sir.

Mr. LEMING. I will have this marked for identification.

The MEMBER. It may be marked for identification.

The CLERK. Respondent's Exhibit WW for identification.

(The document referred to was thereupon marked "Respondent's Exhibit WW," for identification.)

By Mr. LEMING:

Q. I show you another one of the memoranda you have here, Mr. Kenny, and will ask you if that is also in your handwriting?

A. Yes, sir; this is my handwriting.

Q. What does this show—I withdraw that question. I believe you say this one is also in your handwriting?

A. Yes, sir.

Q. Mr. Kenny, you spoke of getting checks through the mail? Were those checks from the buyers of the beer?

A. Yes, sir.

299 Q. And where would you cash those?

A. I would cash them at the Kingston Bank, the Kingston Trust Company at that time, and I believe now the Kingston National Bank, but it would be the Kingston Trust Company at that time. I believe I would cash them there if my memory is correct.

Q. Did you cash any more of them at the Miners Saving Bank other than the first one?

A. I cannot answer that, for I don't know. I really don't remember.

Q. You cashed them at one or the other of these places?

A. Yes; but I would really say that I cashed them at the Kingston Bank.

Q. That is with the exception of the first one?

A. Yes, sir.

Q. And the amount of that first check, can you state what the amount of that check was that you cashed at the Miners Savings Bank?

A. Well, this date here is July 21st, and that would be \$2,116.85. That is the first date I have got on here.

Q. Now, I had asked you to identify your handwriting on the



second one of these memoranda, and then at that point I handed it to counsel to examine.

Mr. LEMING. I would like to have this marked for identification.

The MEMBER. It will be marked for identification.

The CLERK. Respondent's Exhibit XX for identification.

(The document referred to was thereupon marked "Respondent's Exhibit XX" for identification.)

300 By Mr. LEMING:

Q. Mr. Kenny, do you know what price per barrel you paid Kehoe for the beer, or was it a barrel or half a barrel they were shipping?

A. Half barrels.

Q. How did they figure prices on half barrels or barrels?

A. Barrels.

Q. Do you recall the price per barrel?

A. \$19.

Q. How many barrels make a carload?

A. 100 barrels. 200 half barrels made 100 barrels.

Q. 100 barrels?

A. That constituted 200 half barrels?

Q. And that was a carload?

A. Yes.

Q. Did you discontinue your transactions after this last purchase you have testified about?

A. Yes; I did.

Q. Do you know a man by the name of O'Neill; Hughey O'Neill?

A. Yes; I do.

Q. Did you have a conversation with John Kehoe about him?

A. What is that?

Q. Did you ever have any conversation with John Kehoe about Hughey O'Neill?

A. Yes; I did on one occasion.

Q. What was that, Mr. Kenny?

A. O'Neill came to Kingston to see me. He thought he was paying too much for beer, and he wanted me to see the man I was getting it from and see if he could not get a reduced rate.

301 So I went and told Mr. Kehoe that O'Neill was in town and would like to make an arrangement to get reduced rates on the beer, and Mr. Kehoe told me that if he did not like the way it was, he could quit, and I left Mr. Kehoe and went back to O'Neill and told him.

Q. Did you have any later conversation with Kehoe about it?

A. No; that is the only one I remember.



Q. Did he ever say anything to you about O'Neill after that?

A. No; he did not.

Q. Did you know a prohibition agent by the name of Farlow?

A. I didn't know him. I was not acquainted with him, but I think he came to see me, and I think that is the name he gave me, and showed me his credentials.

Q. Do you remember what year that was?

A. No; I do not.

Q. Was it sometime after you had discontinued your purchases?

A. Yes, sir.

Q. Did you have any conversation with John Kehoe about that prohibition agent?

A. Yes, sir.

Q. Will you state what it was?

A. I called Mr. Kehoe up and told him there was a man there that wanted some information. Mr. Kehoe asked me if I gave it, and I said no, I did not give him nothing. I did not know anything.

Q. He wanted information about what?

A. About me purchasing beer, and who I was getting it from.

Q. Did Kehoe talk to you later on the phone about it?

302 A. I called up Mr. Kehoe and told him this man had been there, and around six o'clock called me up, and said, yes, the man had been sent there by somebody, and I was right in my information as to him.

Q. Did you know W. B. Loughran?

A. Yes; I do.

Q. How long have you known him?

A. Well, I don't know the year. I met him in the Elks at Wilkes-Barre. I don't know the year, 10 or 12 years ago.

Q. Was that during the time you were buying the beer from Kehoe?

A. Yes.

Q. Did you ever see him at Kehoe's office?

A. No.

Q. Whenever you said "John Kehoe," do you mean the gentleman sitting at the end of the table?

A. What is that?

Q. Wherever you said "John Kehoe," were you testifying as to the man at the end of the table?

A. He is the only one I know of by that name.

Mr. LEMING. That is all.

Mr. GILLESPIE. No cross-examination.

Mr. LEMING. Mr. Kenny may be excused if it is agreeable to counsel?



Mr. GILLESPIE. Yes.

The MEMBER. Very well, Mr. Kenny, you may go.  
(Witness excused.)

Mr. LEMING. I had intended to offer these two memorandums in Mr. Kenny's handwriting. They have been marked for identification as "Exhibits WW and XX." I now offer them in evidence.

303 Mr. GILLESPIE. I object, if your Honor please. They are not admissible. There is no question of the fact. They are memorandums used here for the purpose of refreshing the recollection of the witness. Now, memorandum made by the witness at or about the time of the alleged transaction may be referred to to refresh his recollection. There is no question about that, but, to offer them in evidence and make them a part of the record, which is simply a self-serving declaration used by the witness to bolster up his testimony, as far as we are concerned, or as far as the Board is concerned is not admissible. It is simply a self-serving declaration. It may be put in evidence to contradict him, or embarrass him, or rebut his testimony, and that is as far as it applies. But, as against another person, what he writes down at that time cannot be admissible under any rule of evidence. I challenge my friend to refer to any rule of evidence which will allow that memorandum to be offered in evidence as against another party, or either party to a proceeding.

The MEMBER. Do you desire to say anything, Mr. Leming?

Mr. LEMING. The memorandum which a person identifies as being his own handwriting, and is simultaneous, or practically simultaneous with the transaction involved, is as I understand it thoroughly admissible.

Now, assuming a witness had no independent recollection of the transaction without his memorandum, the memorandum would become admissible upon his testifying that he wrote  
304 it at the time, and that is all he knew about it. But, this witness independent of this memorandum testified as to certain transactions. He then referred to the details which, of course, he could not carry in his mind over a period of years.

The MEMBER. The objection will be overruled, and they will be admitted and marked Respondent's Exhibit WW and XX.

Mr. GILLESPIE. Exception.

The MEMBER. Exception will be noted.

(The documents referred to were received in evidence and marked, respectively, "Respondent's Exhibits WW and XX," and made a part of this record.)

Thereupon WILLIAM L. FOSTER was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:



Direct examination by Mr. LEMING:

Q. Mr. Foster, where do you reside?

A. West Pittston, Pennsylvania.

Q. Is that a part of what is generally known as Pittston, Pennsylvania?

A. It is the borough next to the city divided by the Susquehanna River.

Q. Then when we refer to Pittston, Pennsylvania, does that include West Pittston?

A. The post office is the same.

Q. And the word "West Pittston" is simply used to designate one section of the city?

A. It is not part of the city; it is a separate borough.

305 Q. How long have you resided there, Mr. Foster?

A. Since 1866.

Q. What is your business?

A. President of the Miners Savings Bank, Pittston.

Q. How long have you been president of that bank?

A. I can't give you the number of years.

Q. It is so long you cannot remember?

A. It is not so long, but I have been with the institution since 1888 from a clerk up.

Q. You were subpoenaed to appear here, were you not, Mr. Foster?

A. Yes.

Q. And you were subpoenaed to bring certain records?

A. That is correct.

Q. Is that one of the records brought by you in response to the subpoena [handing book to witness]?

A. Yes.

Mr. LEMING. I will ask that this be marked for identification.

The MEMBER. It may be marked.

The CLERK. Exhibit YY for identification.

(The document referred to was thereupon marked for identification "Respondent's Exhibit YY.")

By Mr. LEMING:

Q. Will you describe what that record is that you have produced?

A. A certificate of deposit book of the bank.

Q. Of the Miners Savings Bank of Pittston?

A. Correct.

306 Q. Mr. Foster, I call your attention to the stub in this record marked for identification YY, which shows certificate number 696, that is the stub of certificate 696, and I will ask you if you know whose handwriting that is opposite?

A. Mine.



Q. Will you state, Mr. Foster, if that certificate of deposit number 696, is still outstanding?

A. It is.

Q. What is the amount of it?

A. \$25,000.

Q. What is the date of it?

A. December 9 [29], 1925.

Q. In whose name is it issued?

A. American Surety Company.

Q. At the time that certificate was issued, was it based upon a deposit of \$25,000 in cash?

A. No.

Q. Will you please state upon what it was issued?

A. Issued on a joint note of Thomas Kehoe and John Kehoe.

Q. John Kehoe who is sitting at the end of the trial table?

A. Yes.

Q. Do you know in whose possession that certificate of deposit now is?

A. No.

Q. Was that note of John Kehoe and Thomas Kehoe afterwards paid off, or I will ask you in this way, has that note been paid?

A. The note was paid by consolidation of another note of John Kehoe.

Q. I asked you a moment ago about the handwriting opposite the certificate or the stub, and I believe you said it was in your handwriting?

A. Correct.

Q. Well, is it all in your handwriting, or just one part  
307 of it, or just which part, the first line or the last line?

A. The two top and two bottom.

Q. I call your attention, Mr. Foster, to another volume which has on the back of it "Discount Bills Book No. 16, Miners Savings Bank, Pittston." Is that one of the records produced by you?

A. Yes.

Q. One of the bank's regular records?

A. Correct.

Q. And what do you call the book, is that the correct title of the book on the back?

A. The proper title to be used.

Q. Now, was that note upon which that certificate of deposit was issued a demand or a time note?

A. A demand note.

Q. Can you find it on the last record that you have identified as being a record of the bank?

A. Do you want the date of it?



Q. If you will just say first, if you find it, Mr. Foster.

A. The record of such a note is here.

Q. That is, you have the book open at the place where the record of the note appears?

A. That is correct.

Q. Now, Mr. Foster, you have this volume open before you on which you say there is a record of that note, and I will ask you to read across from left to right the caption of each column on those two sheets, what is the caption and the column?

A. (Reading). New number, maker, old number, endorser, dated, due, discount billed, bond, mortgage collateral, judgments. Those three have a caption under debit. The next two have a credit caption discount bills, bond, and mortgage collateral. The next is discount, and the next is interest.

308 Q. Now, will you kindly read from left to right again, Mr. Foster, stating what appears in each column in respect of this note signed by John and Thomas Kehoe for \$25,000?

A. No. 41187, John and Thomas Kehoe, endorsers selves, date January 29, 1925, due date, demand; amount \$25,000 and interest.

Q. Now, in the date column, I just want to be sure that I heard you correctly, what is that date?

A. December 29th.

Q. December 29th, 1925?

A. Yes.

Q. The date is not January 29th?

A. December 29th is correct.

Q. December 29th, 1925, is the correct date?

A. Yes.

Q. And the date in January that you mention, you took from the wrong column?

A. Yes; a lineup.

Q. That January date did not have anything to do with this note?

A. No.

Q. Now, what do you call the interest column, just to be clear, "and interest"?

A. Well, under the column headed "Discount," it says, "and interest."

Q. That correct?

A. Correct.

Q. Now, under the column immediately to the right of that caption "Int." what is the word opposite this note?

A. "Counts" so late on the preceding day that it did not go in and it had to be counted somewhere.

Q. To get the record straight, what is that word in the last column?



A. "And interest."

Q. What is this item to the right of it?

309 A. "Counts."

Q. What is the caption of that item?

A. It says interest at the top.

Q. That is what the book shows?

A. Correct.

Q. And under that caption, opposite this note, it says "Counts"?

A. Yes; correct.

Q. Will you explain to his Honor what is meant by the word "Counts"?

A. My recollection of this note—

Q. I beg your pardon, Mr. Foster.

A. You just want the word counts.

Q. Yes; let me ask you this, is the word "Counts" a word generally employed at the bank?

A. Yes; by our proof man, items coming in late at night, that is late in the banking hours occasionally go in what is called counts and they are entered in the books the next day.

Q. By the way, can you inform his Honor, if you know, what is a count-out slip?

A. Count-out?

Q. Yes; is there such a term as count-out slip?

A. Yes; that is what we term it. We use it as a memorandum for a party that leaves cash or a check that has not gone through the books, and is waiting for a credit to somebody.

Q. Does that credit invariably and always show upon the book?

A. No.

Q. What do you understand, Mr. Foster, by the meaning of the term "memorandum account" as employed by the bank?

Mr. WHITE. That is by this bank, Mr. Leming?

Mr. LEMING. Yes.

310 A. Memorandum account, that is for the proofreader, the proof man.

Q. A memorandum account?

A. Yes; either debit or credit.

Q. Do customers have memorandum accounts at your bank, or did they at that time, and is it the practice of the bank, or has it ever been to have memorandum accounts for customers?

A. We have them.

Q. Do those two accounts ever go on the ledger sheets?

A. I presume they do.

Q. Always and invariably?

A. No.



Q. So that when the customer's credit is taken away, there is no record left then on that account?

A. Not unless part of it goes on to some transaction.

Q. No record is left there unless it is passed in to a ledger account, or unless it passes into some transaction or record, is that right?

A. Correct.

Q. And now, going back to this record on which you have just described the columns on the book, and the items appearing under each one of those columns and to the last column which has the word "Counts," what would you say the word "Counts" means there?

A. The same as a memorandum.

Q. The same as a memorandum account?

A. Yes.

Q. Does that column in which the word "Counts" appears, which is in the caption "Int.," being the last column of the series, is there a credit to someone, a credit to someone of interest, or payment of interest to someone?

311 A. No.

Q. What is it?

A. In this case, do you want to know what it is?

Q. Yes.

A. In this case the note was given I would say between half past two and three o'clock. The certificate of deposit was issued and went through the books on that day, the note was not entered until the succeeding day, and it was counted in what we call our accounts overnight.

Q. It is not quite clear to me yet, Mr. Foster, just why the word "Counts" appears there. I know you have been very kind in trying to tell me.

A. That is where, you see it would have to go on these books out of counts into this ledger.

Q. In that case, can you tell us a little clearer what "Counts" would mean? Would that mean there is a count-out slip issued for \$25,000?

A. The certificate of deposit went through on one side of the ledger of the preceding day. The note offset the deposit until the next day.

Q. If one maintained a memorandum account, or a count-out account in your bank in the year 1925, which never passed to a credit sheet, and which never passed into a transaction in the bank, of which a record was made, would you have any record now to identify that account?

A. No.



Mr. LEMING. I have heretofore asked that this book, certificate of deposit book produced by the witness of the Miners Savings Bank be marked for identification, and has been so marked Respondent's Exhibit YY. I now wish to have marked for identification the stub of certificate 696, together with the handwriting at the left and opposite that certificate stub. 312

The MEMBER. It may be so marked.

The CLERK. Certificate stub 696 is marked for identification Respondent's Exhibit ZZ.

Mr. LEMING. That identification will include the stub and the handwriting to the left of it.

(The document referred to was thereupon marked "Respondent's Exhibit ZZ," for identification.)

By Mr. LEMING:

Q. Just so that the record will be clear, Mr. Foster, I want to call your attention to this stub certificate 696, and to the handwriting to the left of it, which is marked for identification "Respondent's Exhibit ZZ." Now, that is the certificate of deposit and the handwriting about which you have testified, is it not?

A. Correct; yes.

Mr. LEMING. We wish to have marked for identification the two pages of discount bills book, No. 16, upon which the witness has identified the note of \$25,000 made by John and Thomas Kehoe, date December 29, 1925.

Mr. WHITE. Mr. Leming, if you wish to dispense with the necessity of leaving the book, we will be very glad to have photostatic copies made. The bank might have some use for the book.

Mr. LEMING. Photostatic copies may be made.

The CLERK. Respondent's Exhibit AAA for identification.

(The document referred to was thereupon marked "Respondent's Exhibit AAA," for identification.)

313 By Mr. LEMING:

Q. Mr. Foster, do you recall to who you delivered that certificate of deposit, No. 696?

A. I delivered it to David R. Thomas and William F. McHugh.

Q. Do you recall who David R. Thomas was?

A. An employee of the American Surety Company, agent, I presume his title was.

Q. He is now dead, is he not?

A. Yes.

Q. Was D. R. Thomas local agent for the American Surety Company?

A. Yes.



Q. Did you know at the time of the delivery of the certificate for what purpose it was to be used?

A. No.

Q. I believe I asked you if that note upon which it was based has been paid?

A. It was consolidated with another, or, at least, one other note of John and Tom Kehoe.

Q. Has that note been paid?

A. I think it has.

Q. Now, I call your attention again to the stub of certificate of deposit 696 and to your handwriting on the left-hand side, which says this—will you just read the date there and the first line, which you say is your handwriting?

A. 1930, December 30, interest paid to January 1, 1931, \$7,380.

Q. Now, what does that mean; does that mean interest paid to someone?

A. That was paid on a note or mortgage, I have forgotten which, of John and Thomas Kehoe; an obligation, anyway.

Q. Does that entry you have just read apply to certificate of deposit 696?

314 A. Yes.

Q. And was this interest you mention interest on that certificate of deposit?

A. I will explain it this way: This note and other notes were consolidated without my knowledge, and John and Tom Kehoe paid 6 percent on the full amount of the consolidated note. The bookkeeper discovered this payment and from the period of the consolidation to this date, interest was rebated on a 6 percent basis.

Q. And credited to them on their consolidated note?

A. Yes; or an obligation of theirs.

Q. An obligation?

A. Yes.

Q. Of theirs?

A. Of these two gentlemen; yes.

Q. Can you make it a little clearer, please, how there was an overpayment of interest; did I understand you to say there was an overpayment of interest?

A. Yes. The understanding on this note as an overpayment of interest was that the certificate of deposit was not to draw any interest and the note was not to draw any interest, because it was supposed that this obligation would be wiped off in a short time. They consolidated—John and Tom Kehoe consolidated their notes, and this note of \$25,000 was included, and we at the bank



collected interest on the \$25,000 note. No interest was paid on the certificate of deposit and the refund was 6 percent of the amount that they had paid from the consolidation of the note to the date of the payment in 1931.

Q. And you credited, then, the \$7,380 overpayment on their consolidated note?

315 A. On the obligation of John and Tom Kehoe.

Q. Do you call it a consolidated note?

A. Yes; that is what it was.

Q. Your answer is that is what it was?

A. I am not so sure it was that note or some other note, but it was credited on an obligation of John and Tom Kehoe.

Q. It was credited on an obligation of John and Tom Kehoe?

A. Correct.

Q. Do you know, Mr. Foster, of your personal knowledge, if John R. Kehoe maintained a memorandum account or a count-out account in your bank in 1924, 1925, or 1926, which never passed to a ledger sheet or to other transactions of record?

A. No.

Q. Your answer is you do not know?

A. I do not know.

Q. Did you know William F. McHugh, Mr. Foster?

A. Yes.

Q. How long have you known him, Mr. Foster?

A. Ten or twelve years.

Q. Do you mean up to this time?

A. No; up to the time of his death.

Q. To the time of his death?

A. Yes.

Q. Do you recollect the year of his death?

A. No.

Q. You say you have been connected with the Miners Savings Bank since 1888?

A. Yes.

Q. And have lived at Pittston since 1862?

A. 65.

Q. Would you have taken the note of W. F. McHugh for \$25,000 on December 29, 1925?

316 A. Would I have taken it?

Q. Yes, sir.

A. No, sir.

Q. Why would you not have taken it, Mr. Foster?

A. He did not own enough property and could not offer collateral in any such amount.

Mr. LEMING. You may take the witness.



The MEMBER. Are you through with the witness, Mr. Leming?

Mr. LEMING. I beg pardon?

The MEMBER. Did you say you are through with the the witness?

Mr. LEMING. Yes.

The MEMBER. We will take about ten minutes recess.

(Whereupon a recess was taken.)

Mr. WHITE. Mr. Leming, you had finished with the witness?

Mr. LEMING. Your witness.

Mr. WHITE. Will you read the last question and answer of the witness?

(The question and answer referred to were read by the Reporter as above recorded.)

Cross-examined by Mr. WHITE:

Q. Now, Mr. Foster, in making that response to that question referring to the \$25,000, I assume that was your opinion of how much property Mr. McHugh owned or his ability to supply collateral?

A. Correct.

Q. You had no exact personal knowledge of what McHugh's financial position was or how much property he owned, did you?

A. No.

Q. You made no inquiry?

A. He made no offer and I made no inquiry.

Q. So that the answer is based entirely upon your own opinion, but is not supported by any personal knowledge?

A. No.

Q. Now, Mr. Foster, let us go back to the time when that note was presented to you first; by whom were you first solicited to loan \$25,000, for which a certificate of deposit was to be issued to the American Surety Company?

A. Mr. McHugh and Mr. Thomas came to the bank.

Q. And by Mr. Thomas, you mean David R. Thomas?

A. Yes; David R. Thomas and William F. McHugh. They suggested that they make a note and this certificate of deposit would be issued on their obligation.

Q. And what was your response to that?

A. I demurred and told them I did not consider Mr. Thomas and Mr. McHugh—that I did not consider their resources sufficient to pay the note if demanded.

Q. Of course, they did not tell you the purpose for which the certificate of deposit was to be used?

A. No.



Q. And you had no independent knowledge of what it was to be used for?

A. None.

Q. And upon that statement by yourself, of course you did not take the note of McHugh and Thomas?

318 A. No.

Q. Is that correct?

A. Correct.

Q. And when did you next hear anything about this transaction, or proposed transaction?

A. I think it was the next day.

Q. From whom?

A. Mr. McHugh and Mr. Thomas came in and offered the names of John and Thomas Kehoe as makers of the obligation, of the note.

Q. And was that acceptable to you?

A. It was.

Q. And is that when the arrangement was concluded?

A. It was.

Q. And is that when the understanding was entered into between yourself and McHugh and Thomas that this note was not to bear any interest?

A. Right.

Q. And that the bank was not to charge or collect any interest on the note?

A. Correct.

Q. And the certificate of deposit, the bank was not to pay any interest on it?

A. No; it was not to pay interest.

Q. Do I understand from that arrangement that actually no money passed in or out of the bank?

A. No, sir.

Q. It was a matter of bookkeeping; is that correct?

A. It was.

Q. By which on one side of the ledger appeared a note for \$25,000 and against that, on the other side, a certificate of deposit for \$25,000?

A. Yes.

319 Q. And at the risk of repeating, I say again it is true that no interest was to be charged by the bank on the note and none paid by the bank on the certificate of deposit?

A. Yes?

Q. Now, when and by whom was the note for \$25,000 delivered to you?

A. On the 29th of December, 1925, I think the books show. May I refer to it?



Mr. LEMING. Yes, sir.

Mr. WHITE. I believe that is the correct date. That is the date of the note, Mr. Foster.

By Mr. WHITE:

Q. That is the date you received the note?

A. Yes.

Q. From Mr. McHugh?

A. Mr. McHugh and Mr. Thomas was also there.

Q. And Mr. Thomas was there?

A. Yes.

Q. Now, you testified that the certificate of deposit was issued some time between 2:30 and 3 o'clock on the afternoon of the 29th?

A. Yes.

Q. I assume from that, that you conversation with Mr. Thomas and Mr. McHugh, during which you signified your willingness to accept the joint note of Thomas and John Kehoe, was earlier in the day?

A. Yes.

Q. And I assume they left the bank and later returned and presented to you this note of John and Thomas Kehoe?

A. Yes.

Q. Before the close of banking hours?

A. Yes.

Q. And I assume that neither John nor Thomas Kehoe  
320 was ever present, nor did you have any conversation with them concerning this note at that time?

A. No, sir.

Q. So far as you know of your own knowledge, Mr. Foster, that note was for the accommodation of Mr. McHugh and Mr. Thomas?

Mr. LEMING. The same objection. Ask him if he knows for whose accommodation it was.

Mr. WHITE. I submit that in the cross-examination of any witness we are entitled to wide latitude. The witness has testified generally to the nature of this transaction and I am only asking him what he knows.

The MEMBER. He can state what he knows. You may answer.

Mr. WHITE. Will you read the question?

(The question referred to was read aloud by the Reporter as above recorded.)

The MEMBER. That question contained the statement if he knows.

The WITNESS. I can only say I presume it was Mr. McHugh's obligation.



Mr. LEMING. I move the answer be stricken. It is not a case of presumption here. I move it be stricken.

Mr. WHITE. This is cross-examination.

Mr. LEMING. But cross-examination does not make presumptions evidence.

The MEMBER. The answer, I would say, speaks for itself. The motion be denied.

Mr. LEMING. Just for the record, I would like an exception, if your Honor please. May the Reporter note it?

The MEMBER. It may be noted.

321

By Mr. WHITE:

Q. Now, was Mr. McHugh the one who promised you payment of the obligation within a short time?

A. That was the understanding; it was to be a short story.

Mr. LEMING. Now, just a moment, please. I move that answer be stricken. It is not responsive.

The MEMBER. The motion be denied.

Mr. LEMING. Exception, if your Honor please.

The MEMBER. You may have an exception.

Mr. WHITE. Will you read the answer?

(The answer referred to was read aloud by the Reporter as above recorded.)

By Mr. WHITE:

Q. And, of course, payment was not made within a short time, Mr. Foster?

A. It was not.

Q. I believe you testified that the note was combined with other obligations of John and Thomas Kehoe?

A. Yes.

Q. And without your knowledge?

A. Without my knowledge.

Q. Of course, you were the party who made the arrangement with Mr. McHugh and Mr. Thomas?

A. Yes.

Q. And I understood you to say in response to Mr. Leming's questions that about December 30, 1930, you discovered that this note had been combined with other obligations of John and Thomas Kehoe. That, by way of refreshing your recollection, was the date on which the first interest payment was made?

322 A. I am a little shaky on the dates. [Witness refers to paper.] It was on January 1, 1931.

Q. That you made the discovery?

A. Yes.

Q. Or thereabouts?

A. Yes. That was the date it was refunded.



Q. And I believe you also testified that having discovered that, which, of course, was in violation of the earlier understanding, you thereupon refunded the interest at the rate of 6 per cent from the date that the note was combined?

A. Correct.

Q. And you also ascertained I assume, that from the date of the combination of the note and other obligations of John and Thomas Kehoe, they had paid interest on that combined obligation?

A. Yes.

Q. Now, Mr. David R. Thomas was a resident of West Pittston, was he not?

A. Yes.

Q. And you knew him well, did you not?

A. Yes.

Q. And you have testified that you knew Mr. William F. McHugh some ten or twelve years?

A. Yes.

Q. You knew him as a rather prominent citizen in Pittston, did you not?

Mr. LEMING. What is the relevancy of that?

Mr. WHITE. I want to point out how well he knew Mr. McHugh.

Mr. LEMING. That is objected to as being wholly irrelevant and immaterial. The witness has testified to the capacity in which he operated as agent for the American Surety Company.

Mr. WHITE. There is no harm, as I see it.

The MEMBER. The objection will be overruled.

Mr. WHITE. Will you repeat the question?

(The question referred to was read aloud by the Reporter as above recorded.)

The WITNESS. This is McHugh?

By Mr. WHITE:

Q. Yes.

A. Mr. Thomas' name was also used.

Q. I am referring now to Mr. McHugh, Mr. Foster.

A. My recollection of Mr. McHugh was that he was Secretary of the Council for some years and representative of the Commonwealth for some years. I knew him very well.

Q. He was likewise a candidate for mayor on one occasion, was he not, against P. K. Brown?

A. I do not recall.

Q. Sir?

A. I do not recall that.

Q. He was likewise Secretary of the Chamber of Commerce at Pittston at one time, was he not?



A. Yes, he was.

Mr. WHITE. Take the witness.

Redirect examination by Mr. LEMING:

Q. How long have you known John Kehoe, Mr. Foster?

A. Twenty years.

Q. Twenty years?

A. Yes.

Q. Is he an outstanding figure in that locality?

324 A. Yes.

Q. Is he an outstanding figure in Luzerne County?

A. Yes.

Q. Is he not a dominating factor in that locality?

Mr. WHITE. If your Honor please, I do not see the relevancy of this.

Mr. LEMING. That is quite relevant, if your Honor please.

Mr. WHITE. If counsel for the respondent will explain why it is relevant, I should like to hear it. What difference does it make whether this man is a dominating figure, as denominated by the attorney for the respondent?

Mr. LEMING. It is just as important as whether or not McHugh was secretary of some chamber of commerce.

Mr. WHITE. No, if your Honor please. The questioning of the witness on the stand as to his knowledge of McHugh and his acquaintance with Mr. McHugh is based upon this: In response to the last question asked by Government counsel as to why he would not advance \$25,000 to Mr. McHugh, the witness made the answer that he did not own enough property or could not furnish collateral to justify such an amount. Now, I want to know from the witness and I have asked him the question, how well he knew him. I think that is perfectly justified under the circumstances. But the occasion or necessity of inquiring into the dominance of the petitioner here is not apparent. This witness was presented by the respondent. He has testified fully, clearly and plainly. I see no occasion for examining him in this fashion or attempting to cross-examine him. I  
325 therefore renew the objection.

The MEMBER. The objection will be overruled.

Mr. WHITE. Exception.

The MEMBER. He may answer if he knows.

An exception will be noted.

By Mr. LEMING:

Q. Do you have the question in mind, Mr. Foster, or would you like to have it read?

A. I would like to have it repeated.

(The pending question was read by the Reporter.)



The WITNESS. I would like to ask what he means by "dominating factor."

By Mr. LEMING:

Q. Does he have influence there much greater than the average citizen?

Mr. WHITE. I object to that question and I submit the question is not material or relevant to the issue before your Honor. What difference does that make in this proceeding?

The MEMBER. What is the purpose, Mr. Leming?

Mr. LEMING. The purpose is to show, if your Honor please, that this petitioner was a man of power and influence in that locality. There has been testimony here, at least by one man, to great subservience to that personality. The testimony, up to this point, as far as the record shows, is that William F. McHugh was an employee of this petitioner. I wish to follow that question with others in respect of this man's means, which, coupled with his dominating personality, provide or furnish a situation  
326 whereby a brewery might well be operated in the manner that the testimony up to this point indicates that brewery was operated.

The MEMBER. The objection will be overruled. He may answer.

Mr. WHITE. Before your Honor does that, may I say further that this matter is simply one of bookkeeping. The question of whether or not Mr. Kehoe was a man of influence or power has nothing to do with it, and I add to the reasons for my objection this further one: That this question calls for the opinion of the witness and I submit that this is not the proper way of proving those facts which Mr. Leming has stated to your Honor he proposes to show, and certainly this testimony has no bearing on the transaction about which Mr. Foster has already testified, and certainly no bearing upon the issue before your Honor, which is the question of his income for 1925.

The MEMBER. The ruling will be allowed to stand.

Mr. WHITE. Exception.

The MEMBER. An exception will be noted.

By Mr. LEMING:

Q. Would you like to have the question repeated, Mr. Foster?

A. Yes.

Mr. LEMING. Will you read it, please?

(The question referred to was read aloud by the Reporter as above recorded.)

Mr. WHITE. I would like, if your Honor please, that you request Mr. Leming to state what he means by the word "influence" in this question. Influence for what, as bearing upon  
327 this transaction?



Mr. LEMING. I do not think the witness is under any misapprehension, if your Honor please—

The MEMBER. Just a moment. I do not know that this testimony or answer will have such great weight in the matter. That is something we will have to determine, but I would say that Mr. Foster certainly impresses one as being a man who would appreciate and understand a request for an expression of that kind, as to what influence meant as used in a question of that kind, and he can express his answer in the words that he chooses as answering the inquiry. He is capable of doing that, he so impresses me.

The WITNESS. I have always found Mr. Kehoe to be a man who was interested in the City of Pittston and its surroundings. He has contributed to every good institution, to my knowledge, not only of money, but of his good will. He has many followers as to his ability and knowledge. That is the best I can frame any answer to that question.

Mr. LEMING. Will you read the answer, please?

(The answer referred to was read aloud by the Reporter as above recorded.)

By Mr. LEMING:

Q. Mr. Foster, you were asked if this note transaction was simply a bookkeeping matter, I believe. May I ask you this. If and when that certificate of deposit No. 696 is presented to the bank, will the bank pay it?

A. Sure.

328 Q. Sure?

A. Yes.

Q. That means a cash transaction, does it not?

A. Yes.

Q. And that means too, does it not, that the bank has \$25,000 in cash which it holds against that certificate of deposit?

A. We have \$25,000 to pay it.

Q. You mean the bank has \$25,000 with which to pay it?

A. Yes.

Mr. LEMING. Thank you.

Mr. GILLESPIE. I am glad to hear that.

By Mr. LEMING:

Q. Mr. Foster, it is a little difficult for me to understand why you did not discover this matter they were talking about in the period from 1925 up to January 1, 1931; how did it happen that the discovery you speak of was delayed so long?

A. It was called to my attention either by Mr. McHugh or Mr. Kearns, that this note was included in the consolidation, and I knew nothing of it.



Q. Was Mr. McHugh an employee of the bank?

A. No, sir.

Q. Was Mr. Kearns an employee of the bank?

A. No.

Q. But you did not hear anything about it from December 1925 to until January 1931?

A. The consolidation of these notes occurred between those periods; not so far back as 1925.

Mr. LEMING. I thought counsel fixed a date of discovery.

Mr. WHITE. No; I did not, Mr. Leming.

The WITNESS. No.

329 By Mr. LEMING:

Q. Do you know, Mr. Foster, by whom W. F. McHugh was employed in the years 1923, 1924, and 1925?

A. I cannot place the dates of his employment.

Q. I think you were asked about some understanding at the time this loan of \$25,000 was applied for, I will ask you to state again if you knew then or if you know now of your own personal knowledge for what that \$25,000 deposit certificate was used?

A. I do not.

Mr. LEMING. No further questions.

Mr. WHITE. That is all, Mr. Foster—you do not mind my asking him something, do you Mr. Leming?

Mr. LEMING. That is quite all right.

(Discussion off the record.)

Recross examination by Mr. WHITE:

Q. Now, Mr. Foster, I direct your attention to Respondent's Exhibit YY marked for identification, in which certificate of deposit No. 696, designated as "Respondent's Exhibit ZZ" for identification appears, and a note in pencil, and direct your attention to the word "no," and I ask you whether or not that is your handwriting?

A. Yes.

Q. I ask you when that pencil notation "no" was placed on the stub of certificate 696.

Mr. LEMING. May I see it just a minute, please?

Mr. WHITE. Yes, sir.

330 Mr. LEMING. Where is that?

Mr. WHITE. Right there (indicating).

Mr. LEMING. If he knows.

Mr. WHITE. Well, he put it there.

Mr. LEMING. That is all right. If he knows the date. He says it is his handwriting; if he knows the date.

The WITNESS. I put it on at the time we had the discussion. I filled out the stub and marked it 3 per cent interest, and after



discussion with Mr. McHugh and Mr. Thomas it was decided there was no interest to be paid either way, so I marked it by that method, with the ring around it.

By Mr. WHITE:

Q. Your will notice, Mr. Foster, that the word "no" is written between two lines, one above and one below, and is followed by an arrow pointing to the 3 per cent?

A. Correct.

Q. And that is surrounded by a circle?

A. Yes.

Q. I ask you whether or not that circle and its enclosures refer to Certificate 696?

A. It does.

Mr. WHITE. I will ask Mr. Leming to have the designation of this exhibit include the circle with the word "no" in it.

Mr. LEMING. If agreeable at this time I will offer the original in evidence, with the agreement a photostat may be substituted so they may take the book back.

Mr. GILLESPIE. The photostat will show it?

331 Mr. LEMING. There is not any photostat now. My offer was of the original. Then I will agree to the substitution, because that is an outstanding deposit.

Mr. WHITE. We have no objection to the offer, subject to a motion to strike.

The MEMBER. It will be admitted and marked as Respondent's Exhibit ZZ.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit ZZ," and make a part of this record.)

Mr. WHITE. We have no objection to substituting a photostat. That is all, Mr. Foster.

Mr. LEMING. Just a moment, please, as long as we are following through that way.

I should like to offer in evidence at the same time the entry heretofore marked AAA for identification, in discount Bill Book No. 16, which the witness has already described.

Mr. WHITE. Have you finished?

Mr. LEMING. Yes.

Mr. WHITE. There is no objection to the admission of this exhibit at the present time.

The MEMBER. It may be admitted and marked.

The CLERK. Exhibit AAA in evidence.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit AAA," and made a part of this record.)



Mr. WHITE. If your Honor please, this book about which I said I had no objection to the photostatic copy of the page is the one just referred to.

The MEMBER. Very well.

Mr. LEMING. That applies to both?

332 Mr. WHITE. Yes.

The WITNESS. We do not use that book [indicating].

By Mr. LEMING:

Q. Then, there is no rush about it?

A. No.

Q. But you want the other one?

A. Yes; I would like to have the other one.

Mr. WHITE. Did you say you had a photostat?

Mr. LEMING. No; I do not have a photostat now.

The MEMBER. Is that all now, Mr. Leming?

Mr. LEMING. If you will bear with me just a moment, if your Honor please—that is all, if your Honor please.

Mr. WHITE. That is all.

(Witness excused.)

Mr. LEMING. Mr. Foster understands that he is subject to call. There are some other matters he may testify to.

The MEMBER. Surely.

Mr. LEMING. Mr. Keating's absence has disturbed my order just a little bit and I will have to figure just a moment, if you please.

The MEMBER. All right.

Mr. LEMING. I will call Mr. Locke.

CHARLES J. LOCKE was recalled as a witness on behalf of the respondent and, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

Mr. LEMING. May I have the returns in evidence, please?

333

By Mr. LEMING:

Q. Now, Mr. Locke, when you were previously on the witness stand you examined these income tax returns, and it is my recollection you said you made them up from books that you indicated were lying on the table at that time?

A. Yes.

Q. Now, will you kindly examine these books right here, if you will step down, and make your examination, or, if you have made it, you may answer where you are, if these four books are the ones from which you made up the returns?

A. They are.

Q. They are the ones from which you made up the returns?



A. Yes.

Mr. LEMING. May these four books be marked for identification, please, in consecutive order?

The MEMBER. Let them be marked for identification.

The CLERK. Exhibits BBB, CCC, DDD, and EEE.

(The documents referred to were thereupon marked, "Respondent's Exhibit BBB, CCC, DDD, and EEE," for identification.)

Mr. LEMING. Will you note the style of each book, Mr. Clerk?

The CLERK. BBB is the journal, CCC is the ledger; DDD is the voucher register, and that also has several loose papers in it—

Mr. LEMING. Let us see the loose papers please. Maybe there is something that does not belong with the book; I do not know.

The WITNESS. They are balance sheets.

The WITNESS. Yes.

334 The CLERK. EEE is the cash book.

By Mr. LEMING:

Q. Do these belong with the books, Mr. Locke, in verifying the returns?

A. Yes.

Mr. LEMING. I wonder if these loose-leaf sheets had not better be marked with the same exhibit number and then numbered one, two, three?

The CLERK. I will clip them in the book before we leave.

By Mr. LEMING:

Q. Now, Mr. Locke, will you kindly state, after refreshing your recollection, if you wish, from the books and the returns, what makes up the total receipts from business or profession, as shown, for instance, on the 1925 return which I hand you and which is Respondent's Exhibit FF? I wonder if you understand my question.

A. That takes up all of the receipts that were received, according to the balance sheets. It is made up from the balance sheets and the ledger, resources and liabilities, and losses and gains.

Q. And what were those receipts; receipts for what?

A. For the manufacture of the near beer, the sales.

Q. You mean for the sales?

A. Yes.

Q. Is there any other source of income in it except the sale of near beer?

A. That is all of the sales I had, the sales of near beer, except the inventory on the merchandise.

Q. Is there any sale of merchandise in that item outside of near beer?

335 A. No; the sale of merchandise would be only the beer sales. We had no sales of materials or anything else that



I know of except the beer sales, and the inventory of surplus stock left over of the different materials—

Mr. WHITE. We do not hear you, Mr. Locke.

The MEMBER. Will you speak louder?

The WITNESS. I say all of the material used for the manufacture of near beer was put in the inventory and what was put in will show on the inventory account in every department, the materials.

By Mr. LEMING:

Q. Let me ask you this, Mr. Locke: Take, for instance, the 1925 return, which is Respondent's Exhibit FF, and turning to the reverse side, the top line says, "The total receipts from business or profession; state kind of business"; then it says "manufacturing cereal beverages," and the figure is \$97,713.19; may I ask you this: Did that \$97,713.19 represent, so far as the books are concerned the sale of near beer?

A. The sale of near beer.

Q. How was the near beer taken away from the plant?

A. In wagons and trucks.

Mr. WHITE. What did he say?

Mr. LEMING. Wagons and trucks.

By Mr. LEMING:

Q. Is that the way all of the near beer was shipped?

A. There were some customers who came there with their own automobiles or small trucks and we gave it to them from the bottling department and loaded the truck up with what they wanted. Outside of our own wagons, that is what went out.

336 Q. But all of the near beer went out in that fashion?

A. In that way.

Q. In other words, none of the near beer was shipped by railroad?

A. I cannot recollect any that was shipped by rail.

Q. I believe you said that all you had anything to do with was the near beer?

A. That is all.

Q. Now, was there another set of books kept around the brewery?

Mr. WHITE. I believe he answered that question yesterday, if your Honor please.

The MEMBER. I do not recall. He may answer, if he knows.

By Mr. LEMING:

Q. If you know:



A. There were no regular set of books like I was keeping the near beer account, outside of the shipping books that Francis Kane had. He used to keep the shipments of the high-powered beer. I had nothing to do with that. Mr. Kane took care of that.

The MEMBER. What was it he took care of?

The WITNESS. Shipping of the high-powered beer. He kept all of those records. I never got those. He was doing that in the back office.

By Mr. LEMING:

Q. I believe you said you had seen the shipping books?

A. I saw the shipping book back there but I did not go through it because I did not have authority to go into those books. I knew he had it back there.

Q. That would be shipments by railroad?

A. Shipments by rail.

337 Q. But you did not have anything to do with those books?

A. I did not have anything to do with those books.

Q. Did you have any instructions about that high powered side of the brewery?

A. No. I did not. All I know is what I saw going through; I saw the books going through but I never saw any figures or amounts in them.

Q. You spoke of Francis Kane working in the back office; who worked back there with him?

A. Mr. Kearns was back there with him occasionally.

Q. Tommy Kearns?

A. Tommy Kearns; yes. Mr. McHugh had another little office upstairs, where you had to go up steps to a small place where he had his desk.

Q. Who was the directing head of that brewery, Mr. Locke?

Mr. WHITE. If he knows.

By Mr. LEMING:

Q. If you know.

The WITNESS. Mr. John Kehoe.

By Mr. LEMING:

Q. Now, you have testified that you were working for the Kehoe Electrical Construction Company—

A. Under the management of William F. McHugh.

Q. And that Mr. John Kehoe ran that; now, when you were sent over to the brewery to work, who were you working for then?

A. Kehoe Electrical Construction Company.



Q. That is when you were sent over to the brewery?

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A. That is when I was sent over to brewery; yes.

Q. Well, after you got over to the brewery you continued to work for the Kehoe Electrical Construction Company, too?

A. I used to go back to do extra work for Mr. McHugh, because they were discontinuing the business and selling out their stock.

Q. You mean they were discontinuing the electrical business; that they were selling out the electrical supply stock?

A. Yes. Until they dispose of all of that stock I used to go back to fix up the electrical books the best they wanted them, and then I would go back to the plant again.

Q. In other words, you alternated between the Kehoe Electrical Construction Company and the brewery?

A. Yes; for a short period, probably two weeks, back and forth; not every day, but probably once or twice a week.

Q. That is, until the electrical business was closed up?

A. Until the electrical business was closed up.

Q. And then you devoted your time——

A. To the brewery.

Q. In whose employ were you at the brewery?

A. Mr. William F. McHugh employed me and I worked under his instructions.

Q. You worked under his instructions?

A. Yes.

Q. Do you know under whose direction he worked?

A. I understand he was under——

Mr. GILLESPIE. Just a moment, please. He said, "I understand." It is the same objection, the same thing.

339 The MEMBER. Listen to the question carefully, Mr. Locke.

(Question read by the Reporter.)

The WITNESS. It was Mr. John Kehoe, if I must say so.

The MEMBER. He says it was Mr. John Kehoe.

Mr. LEMING. He further says "If he must say so"; that was the last part of his answer.

Mr. GILLESPIE. If the Court please, whether he is testifying from personal knowledge or opinion is something that should be made clear in all fairness.

THE MEMBER. That may be brought out on cross-examination, Mr. Gillespie. He has answered that it was Mr. John Kehoe.

Mr. GILLESPIE. Very well, sir.

By Mr. LEMING:

Q. Mr. Locke, I wonder if you could tell from those books which have been marked for identification as "Respondent's Ex-



hibits BBB, CCC, DDD, and EEE," what the books show as to salary paid to William F. McHugh, that is, per month, or whatever the books show; could you point that out on the books, if there is any such entry?

A. Mr. McHugh's salary was entered in the books.

Q. It was?

A. It was entered every month. I think his salary when I first went over there was \$150 and after that it was raised to \$250, some time later. That is entered in the book. Mr. McHugh would draw his salary and he would then tell me and I would enter it up, his general salary.

Q. Now I believe you already testified you were the book-  
340 keeper at the Kehoe Electrical Construction Company; can you state what salary he was receiving there at the time he went over to the brewery?

A. The same salary.

Q. That is, he was receiving the same salary from the Kehoe Electrical Construction Company?

A. Until he went over, and he continued for a while and then he was raised to \$250. I think the books show that.

Q. Was there any change in your salary from what you were getting at the Kehoe Electrical Construction Company and that which you received at the brewery?

A. Yes, \$5 a week difference; I got \$30 a week from the Kehoe Electrical Construction Company and when I went to the brewery he raised me to \$35.

Q. Dollars a week?

A. Yes.

Q. Do you know what Pat McGowan did around that brewery, if anything?

A. All I ever saw Mr. McGowan was when he would come over and look around in the morning. In the afternoon he would be there some days and others he would not, but he would come over in the morning and look around. That is all I ever saw him do. He never gave me any orders what to do.

Q. That is, McGowan did not?

A. No.

Q. Mr. Locke, can you tell from the books which you kept at the brewery whether or not they reflect any outgoing freight charges for the years 1924, 1925, and 1926, or are you able from the knowledge of the books to say whether or not they do reflect  
any freight charges on outgoing freight?

341 A. On outgoing freight?

Q. Yes.

A. No; I have no charges on outgoing freight, but the incoming would be on materials received, and such as that, but not the outgoing freight.



Q. Do you know, Mr. Locke, whether or not the sales of near beer reflected by the books and by the returns are the exact amount of near beer actually produced; that is, whether it was more or less?

A. All I had to go by was the sales slips turned in to me to be recorded:

Q. The sales-slips which were turned in to you to be recorded?

A. Yes.

Q. And who turned in those slips to you?

A. Mr. McHugh, and sometimes Francis Kane would make them up. He was the shipping clerk and checked up the drivers when they came in. He would make out the sales slips and turn them in to me.

Q. But so far as your information goes, it was just to the slips that you received?

A. Just the slips I recorded in the books as they gave them to me.

Q. Now, as to the prices at which near beer was sold by the brewery, are the prices reflected in the books; that is, per barrel, or case, or whatever quantities they were sold?

A. I think they are. I think the near beer was sold for \$6 a barrel.

Mr. WHITE. You are standing directly in front of the witness, Mr. Leming, and we cannot hear him.

Mr. LEMING. I beg pardon.

The WITNESS. The near beer was sold for \$6 a barrel.

342 By Mr. LEMING:

Q. Was that a uniform price, or did the price change?

A. It was about uniform. It was always \$6.

By Mr. LEMING:

Q. As I understand, you did not handle any high-powered beer on your books?

A. No.

Q. Now, Mr. Locke, the clerk of the Board called attention a while ago to several loose sheets here, and without examining them you said these went with the books. I wonder if you will examine them so we can be entirely clear here after you make an actual inspection of these, to see if all of these belong with your books. These [indicating] are the sheets. I would be glad if you would make a careful examination of them to be sure they belong with the books.

A. These are balance sheets.

Mr. GILLESPIE. What is the answer?

The WITNESS. These are balance sheets connected with my books.



By Mr. LEMING:

Q. I just want to call your attention to this balance sheet here, then, Mr. Locke, marked in pencil December 31, 1925, and the caption there "Inventory of Beer Stock, Materials, and Supplies"; then, under beer stock, it has an item which says, "good, 2,675 barrels at \$9," and carries out a certain total. I want to be clear what that is?

A. That is the beer that was to be dealcoholized; that was to be made into near beer. That was the good beer. I did not have anything to do with the sale of that. It was charged to the bottling department, to be dealcoholized.

The MEMBER. I did not get that answer.

343 The WITNESS. The good beer was to be dealcoholized, the alcohol was to be taken out and it was to be made into near beer. That was charged to the bottling plant from the good beer side. Then it had to be turned into near beer before we could do anything with it.

The MEMBER. I see.

By Mr. LEMING:

Q. This is the inventory at the end of December, and the beer is priced at a certain figure. Until the alcohol was taken out of it, you gave it the high price for inventory purposes?

A. Yes; that is what they charge.

Q. Then your sales would be at \$6 per barrel?

A. After it was dealcoholized and turned into near beer, yes; that was our sales.

Q. On the next line is shown "Beverage," 284 barrels at \$12—

A. That is the price they set on that for my inventory. I had to put it at that price in the inventory.

Q. Now, who gave you those inventory figures there or where did you get those inventory figures?

A. They were made up and given to me by Mr. McHugh.

Q. You did not actually make the inventory yourself?

A. No; they gave me the figures for my inventory.

Q. I see.

A. These prices I got off the invoices on cost of material on invoices, these prices for various supplies shown here [indicating]. Those prices were taken from the invoices at the cost price.

Q. You are talking about items on the same pages under "Estimated tonnage supply"?

344 A. That is right.

Q. That is, on the sheet marked December 31, 1925?

A. Yes, sir.



Mr. LEMING. You may take the witness—I beg pardon. I want to offer all of these books in evidence which have been marked for identification.

Mr. WHITE. For what purpose, Mr. Leming?

Mr. LEMING. These books are offered in evidence as one of the sets of books maintained at that brewery and on the basis of this witness' testimony they reflect only near beer; they do not reflect sales of high power beer. The purpose goes to the whole question of whether or not petitioner, John Kehoe, understated his individual income tax return for the year 1925 and whether or not he was in possession of information at the time he made application for a closing agreement and at the time he signed a closing agreement and at the time the Secretary of the Treasury approved that closing agreement, which he did not disclose to the Commissioner of Internal Revenue or to any other Government official whose official duty it was to investigate his returns.

Mr. WHITE. We have no further objection at this time.

The MEMBER. They may be admitted and marked as Respondent's Exhibits as designated.

The CLERK. BBB, CCC, DDD, and EEE.

(The documents referred to were received in evidence and were marked "Respondent's Exhibits BBB, CCC, DDD, and EEE," and made a part of this record.)

345 The MEMBER. Are you through, Mr. Leming?

Mr. LEMING. Yes, sir; if your Honor please.

The MEMBER. I wonder if you have any idea how long your cross-examination might take?

Mr. GILLESPIE. Speaking from past experience, I say I cannot tell how long it may be; it may be short, but I am afraid it will be quite lengthy under the circumstances.

The MEMBER. Would it suit you just as well to begin your cross-examination in the morning?

Mr. GILLESPIE. I would be just as well pleased. I think we are all tired.

The MEMBER. Under those circumstances we will recess until 10 o'clock tomorrow morning. However, I would like to have a conference with the attorneys after we have adjourned for the afternoon.

We will recess until 10 o'clock in the morning.

(Whereupon, at 5 o'clock p. m., an adjournment was taken until tomorrow, Thursday, August 23, 1934, at 10 o'clock a. m.)

Hearing at Scranton, Pennsylvania, on the 23rd day of August 1934, at 10:00 o'clock a. m.



**CHARLES J. LOCKE**, the witness on the stand at the time of taking the adjournment, resumed the stand and testified further as follows:

**Mr. LEMING.** If your Honor please, if it is agreeable with counsel, I have previously had some check books identified 346 while Mr. McGowan was on the stand in respect of the West Side Trust Company. I had intended to offer them during Mr. Locke's testimony but overlooked them, and if it is agreeable I will offer them now.

(Discussion off the record.)

**Mr. LEMING.** I would like to offer in evidence at this time seven books containing canceled checks of the West Side Trust Company, which have been previously identified as Exhibits MM, NN, OO, PP, QQ, RR, and SS. The purpose of the offer is to show that these checks are ones taken from an account opened in the name Patrick F. McGowan, but in respect of which he did not sign any of the checks, as I recall his testimony, and in respect of which this witness has testified that with minor exceptions, in any event, he prepared the checks and they were signed by Mr. McHugh. This witness has also testified, I believe, that these checks or some of them, at any rate, go into the set of books from which the return was made up.

**Mr. GILLESPIE.** No objection.

The **MEMBER.** They will be admitted and marked as Respondent's Exhibits as identified.

The **CLERK.** MM to SS inclusive.

(The documents referred to were received in evidence, and were marked "Respondent's Exhibits MM to SS," and made a part of this record.)

The **CLERK.** Mr. Leming, you omitted one, I think.

**Mr. LEMING.** TT is a check book, and I might let that go in to complete the record. It is a complete book of blank 347 checks. Apparently no check was ever written in this particular book.

**Mr. GILLESPIE.** There will be no necessity for offering that.

**Mr. LEMING.** It was marked with the other books, but there was no check from it. It is a complete check book.

The **MEMBER.** I do not see that there is any occasion for putting it in, if there was no check written from it.

**Mr. LEMING.** Thank you. That is all right.

May I ask one other question before you proceed, Mr. Gillespie?

**Mr. GILLESPIE.** Yes.



Direct examination by Mr. LEMING:

Q. Mr. Locke, to your knowledge was there a payment of bonuses to employees of the brewery which is not represented on your books of account?

A. Yes.

Q. There was?

A. Yes.

Q. Do you recall what that bonus was?

A. Well, I did not make up the bonus pay roll but there were bonus checks issued, and I gave them out along with the regular checks that were made up on my pay roll. My pay roll was made up by Mr. Kane, and the envelopes were filled and handed to me to give out to the employees, and along with the envelopes or services at the bottling plant there was a bonus envelope which contained \$8, I think, each one got.

Q. \$8 a week?

A. \$8 a week.

348 Q. Now, was that \$8 shown by check, cash, or how?

A. Cash. Mr. Kane used to put up the envelopes in the back room, back of my office, and they were put in a box in the vault, and when the time came for payment, I handed them out with the regular envelopes when the men came into the office.

Q. Did that \$8 bonus apply to each employee?

A. Each employee at the brewery; yes.

Q. Each employee at the brewery?

A. Yes.

Q. And was there a record made on your books of that bonus?

A. Not on my books.

Q. Not on your books?

A. No.

Q. And when you say your books, you mean the ones now in evidence from which the tax returns were made up?

A. Yes, sir.

Q. That Mr. Kane you mentioned was Francis Kane?

A. Francis Kane; Pittston, Pa.

Q. Do you know his middle initial?

A. No, I do not.

Mr. LEMING. That is all right. You may take the witness.

Cross-examination by Mr. GILLESPIE:

Q. Mr. Locke, where do you live; what street and number?

A. 32 Barney Place, Wilkes-Barre, Pa.

Q. You have lived there all your life?



A. 25 years.

349 Q. You are a bookkeeper by occupation?

A. By occupation; yes.

Q. And have been for how long?

A. About 35 years.

Q. And who hired you when you were first employed by the Kehoe Electrical Construction Company; who hired you directly, Mr. McHugh, Mr. Reap, or who?

A. When I was employed, it went back to the Metropole Drug Company, and then I was transferred along different lines by William F. McHugh.

Q. But you were engaged by William F. McHugh for the Electrical Construction Company at Wilkes-Barre; yes or no will answer the question?

A. Yes.

Q. And you remained there how long?

A. I imagine I was with the Kehoe Company in the neighborhood of three years.

Q. As bookkeeper?

A. Yes.

Q. And then it was going out of business?

A. Yes.

Q. It was winding up its affairs?

A. Yes.

Q. And you remained there until it had practically wound up its affairs?

A. Yes.

Q. And when you were hired to go over to the Bartel Brewing Company, you were hired by Mr. McHugh again?

A. I was sent over by Mr. McHugh.

Q. And while you were at the Kehoe Electrical Construction Company store or office, did you ever see Mr. Kehoe there?

A. Yes.

Q. You saw him drop in?

350 A. Yes.

Q. A couple of times?

A. Yes.

Q. Did you have any conversation with him?

A. Not particularly.

Q. Just casually met him, I suppose?

A. Yes.

Q. So when you were over at the brewery you continued as bookkeeper there and took charge and kept the records and accounts of the cereal beverage manufacturing business?

A. Yes.



Q. And you knew nothing about anything else connected with the brewery personally?

A. Personally, I did not.

Q. And you did not attempt to learn anything particularly about it, I suppose?

A. I had no business to try to learn that, because it was not in my line.

Q. You say you knew what was going on; that they were making high-powered beer, to your personal knowledge?

A. I knew what was going on; they were shipping the beer out.

Q. I ask you if you know of your own personal knowledge that they were manufacturing high-powered beer there?

A. I must have known that—

Q. I am not arguing, but simply asking if you know of your own personal knowledge that that brewery was making high powered beer?

A. I did from what I could hear and see from the men around there.

Q. From your own personal knowledge, from what you saw and heard, you believed they were making high-powered beer?

351 A. Yes.

Q. Did you mingle with the men?

A. I was never on the brewery side at all.

Q. You did not mingle with the workmen over there?

A. Only when they came over on my side to get their pay. I never had occasion to go to the other side.

Q. You never had occasion to go into the department in which they were making high-powered beer?

A. No.

Q. And you did not look over things there?

A. No.

Q. And you had no personal knowledge of what was being done there?

A. No.

Q. You had no personal knowledge from observation; is that right?

A. No; I did not go over to see what they were making; it was only what I heard them say they were making and shipping that stuff out.

Q. I might suggest you can answer my questions just as easily directly as by going around the bush.

Mr. LEMING. I submit the witness has the right to answer the way he wants to.



Mr. GILLESPIE. Not as he pleases.

Mr. LEMING. It is for his Honor to say if he does not answer correctly.

Mr. GILLESPIE. It saves time if he answers correctly.

By Mr. GILLESPIE:

Q. You have no personal knowledge of the manufacturing of high-powered beer in that part of the brewery which you were not connected with?

A. No.

Q. That is correct?

352 A. Only I heard them say—

Q. Never mind.

A. I am telling you—

Q. That is all you know about what went on there, what you heard; is that right or wrong?

A. That is right.

Q. Do you drink beer, Mr. Locke?

A. No.

Q. So you would not know high-powered beer if you drank it?

A. Not now.

Q. Would you then?

A. At that time, if I was a drinking man, I would.

Q. But you were not drinking at that time?

A. No.

Q. Therefore you do not know what it is like?

A. I drank a few bottles of the near beer on the bottling side.

Q. That, of course, is no sin. You have no personal knowledge whether it was high-powered beer or cereal beverage which they were making over there?

A. No.

Q. And you did not see them make it?

A. No.

Q. You did not know how it was made?

A. No.

Q. You did not see them fill and ship the kegs?

A. No; but I could hear the kegs rolling and the gate being opened, and I knew there was something going on.

Q. I ask that you answer my questions—

Mr. LEMING. Neither I nor Mr. Gillespie has the right to tell any witness how to answer questions—

353 Mr. GILLESPIE. I beg your pardon.

Mr. LEMING. If he does not answer correctly, it is for his Honor to say.

Mr. GILLESPIE. Then I will ask his Honor to so direct the witness.



Mr. LEMING. His Honor will not tell the witness how to answer, I assume.

The MEMBER. It seems to me, Mr. Gillespie, the witness is answering your questions to the best of his ability.

Mr. GILLESPIE. That may be true, but he may be cautioned to observe the proprieties and practices in answering.

Mr. LEMING. I submit there is no impropriety yet.

By Mr. GILLESPIE:

Q. You were closely engaged in your own work?

A. I was.

Q. And you did not pay much attention to what was going on on that side?

A. I had no occasion—

Q. Will you kindly say "yes" or "no," unless it requires an explanation?

Mr. LEMING. I submit, so the witness will understand his rights, that he does not have to say "yes" or "no" unless he is answering what he thinks to be correct with yes or no.

Mr. GILLESPIE. That is new practice in the courts.

Mr. LEMING. The witness does not have to say "yes" or "no" unless it is the correct answer to make.

Mr. GILLESPIE. How many hundreds and thousands of times have attorneys of any practice in courts heard a judge  
354 admonish the witness to answer by "yes" or "no" and then explain if it requires explanation. We all hear thousands of times, if we happen to be around the courts; we hear that thousands of times. That is all I have to say about that.

Mr. LEMING. And you have heard the court say a thousand times that you cannot make the witness say "yes" or "no."

The MEMBER. Let us proceed.

Mr. GILLESPIE. I do not want to take up your Honor's time.

By Mr. GILLESPIE:

Q. You had no occasion to look after any business but your own?

A. My own business.

Q. That kept you busy?

A. Yes.

Q. You were not personally interested in anything else that went on there?

A. No.

Q. Is that correct?

A. Yes.

Q. And you did not pry about the business?

A. No; only what was handed to me. If information was



handed to me offhand, I got it, but I did not ask for it.

Q. You got no information you did not ask for?

A. Once in a while the men would say something unintentionally and I would hear it.

Q. There was no harm in that?

A. No.

Q. Nothing irregular, illegal, or unlawful?

A. No.

353 Q. You could not help but comment and talk about running the brewery and what they were sometimes doing; that would come to your ears without your helping it?

A. Yes.

Q. Did you ever see Mr. John Kehoe there?

A. Yes; I met him there; I probably saw him there a couple of times.

Q. Do you know where Mr. Shotts' office was on the same premises?

A. I do.

Q. And he is in a tile business; manufacturing and selling tile?

A. Concrete hollow tile blocks.

Q. And his office is on the same premises?

A. Yes.

Q. In the same building as your office?

A. Yes.

Q. Just a short distance away?

A. Yes.

Q. Did you ever see Mr. Kehoe go into Mr. Shott's office; the tile office?

A. I cannot say I did.

Q. He may have been there to see Mr. Shotts?

A. I do not know. I was in the rear.

Q. You just saw him casually?

A. Yes.

Q. You never had any conversations with Mr. Kehoe?

A. No.

Q. No talk or connections with him in any way?

A. No.

Q. You know nothing of any connection he might have had except you saw him on these two occasions on the premises?

A. I saw him there, probably doing business with Mr. McHugh.

356 Q. How do you know?

A. I was not up there.

Q. Then how do you know that?

A. Because I saw him go there.

Q. A hundred people might casually go in there without doing any business?



A. Surely.

Q. That would not mean he was connected with the brewery or was running the brewery or owned it or had anything to do with it; that would not indicate to you he had such a connection?

A. No.

Q. All you know about Mr. Kehoe's connection with the brewery is that you saw him on the premises a couple of times; is that right or is it wrong?

A. That's right.

Q. Certainly. And that is the only thing upon which could base a statement that Mr. Kehoe had anything to do with the brewery?

A. Only through Mr. McHugh. He used to go to Pittston at nights and have a meeting and then come down with his orders.

Q. You do not know that of your own personal knowledge?

A. I did not see it with my eyes.

Q. You did not—

Mr. LEMING. I think he answered it. He said he did not see it with his eyes.

By Mr. GILLESPIE:

Q. That is all you heard was talk, but you were not present at any talk between Kehoe and McHugh?

A. No.

Q. And you did not know what they talked about or what their business was?

A. That is right.

Q. So you really do not know anything about Mr. Kehoe's connection with the brewery other than that?

A. No.

Whereupon PAUL T. JONES was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mr. Jones, have you stated your name to the Reporter?

A. I have.

Q. Where do you live, Mr. Jones?

A. 28 Division Street, Kingston.

Q. And how long have you lived there?

A. About ten years.

Q. And where had you resided before that, Mr. Jones?

A. Shavertown.

Q. Pennsylvania?

A. Yes.



Q. And is that in the same general locality or vicinity as Pittston?

A. No.

Q. As Kingston?

A. Yes.

Q. And what is your occupation, Mr. Jones?

A. Clerk for the Lackawanna Railroad.

Q. At Kingston Station?

358 A. Yes.

Q. And how long have you been employed there in that capacity, Mr. Jones?

A. About 20 years.

Q. And in the years 1924, 1925, and 1926 were you working there in that capacity at that time?

A. I was working in the capacity of Chief Clerk in the freight office until some time in 1925, when I moved from there to the ticket office.

Q. You were still in the employ of the same railroad?

A. Yes.

Q. And at the same station?

A. Yes.

Q. Did you have anything to do with the receipt of money paid for freight on the movement of cars out of that station?

A. Exclusively so; up to the end of my time there.

Q. For 1924, 1925, and 1926?

A. No; I just had a part of 1925.

Q. I see. What would be your duties in that connection, to receive and receipt for money delivered to you in payment for freight?

A. Yes.

Q. Will you examine the records in these envelopes and state whether or not they are records of that station; records of the railroad company at that station?

A. Do you want me to go over these individually?

Q. Have you examined them so you are in a position to state what they are? I notice you have broken a seal on that envelope.

A. Yes; I put that seal on there.

359 Q. So, then without taking time to examine each one of the receipts, you know that it is a receipt from that railroad station?

A. Yes. [Witness opens various envelopes.] They are all receipts of the Lackawanna Station at Kingston.

Q. Now, for what year, Mr. Jones?

A. 1924 and 1925.

Q. Will you examine them again, please?

A. They are all 1925.



Q. Now, do they all have your—strike that and put it this way: Did you receive the money in the cases of all those receipts?

A. Not all of them; no.

Q. Will you indicate which ones you did receive it on and which ones you did not?

A. Those that I did receive it on are initialed by myself.

Q. Will you take one, please, and let us see?

A. Here is an example.

Q. Now, taking each one of those receipts wherever that initial "J" appears on the face of the stamp; is that your initial?

A. Yes.

Q. And you placed it there yourself?

A. I did.

Q. And is that true in respect of every one of these documents you have before you where that "J" appears on the face of the receipt?

A. That is true.

Mr. WHITE. Do you have any objection to our looking at one or two of those, Mr. Leming?

Mr. LEMING. No indeed, Mr. White.

[Mr. Leming hands papers to counsel for Petitioners.]

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By Mr. LEMING:

Q. Now, do you also know that these are the railroad records; records which were made up in the railroad office?

A. They are on official forms of the railroad company.

Q. They are what?

A. They are written on an official form of the railroad company.

Q. Were they written up in the railroad company's office there?

A. Yes; to the best of my knowledge.

Q. Have all of those with your initials on them?

A. Yes.

Q. You would not have written them anywhere else?

A. No.

Q. I believe you said there were some that did not have your initials; may I see those?

A. There are some. [Witness hands paper to Mr. Leming.]

Q. Now, you have handed me several clipped together here with a clip; are they the only ones that do not have your initial?

A. You mean all of this package?

Q. Any of these receipts before you, please segregate those which do not have your initials on them.

A. Here are some that are not initialed at all.

Mr. WHITE. Mr. Leming, do I understand all of them are of similar character to this?



Mr. LEMING. I am checking through to see what they are.

Mr. WHITE. Are they all cashier's stubs?

The WITNESS. Yes.

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By Mr. LEMING:

Q. Your description of them is cashier's stubs?

A. That is right.

Q. Are they duplicates of what was handed to the shipper?

A. Yes.

Q. Now, have you segregated all of those which do not bear your initial?

A. I have.

Q. And that is all of the stubs which are now before you?

A. Yes.

Q. Now, as to any of these which do not bear your initial are you in a position to say whether or not you handled those?

A. No.

Q. Are you in a position to say whether or not they are the records of the railroad company?

A. Oh, yes.

Q. That is, all of these which do not bear your initial?

A. Yes.

Q. Now, I notice three of these you have handed me do not bear a stamp payment like the balance of them; what is the situation there; why is it these three do not bear a stamp payment, if you know?

A. That was probably an oversight. The original no doubt has been receipted and this is just an oversight in failing to get it on the duplicate.

Mr. LEMING. May those three be marked for identification? Those are the three which the witness has spoken about as not bearing the payment stamp.

The MEMBER. They may be marked.

The CLERK. FFF for identification.

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(The documents referred to were thereupon marked "Respondent's Exhibit FFF," for identification.)

Mr. LEMING. How many are in the group that had no stamp on them, Mr. Clerk?

The CLERK. Three.

Mr. LEMING. Here are four others that do not have the stamp on them. Will you put those together?

The CLERK. That is a total of seven slips in Exhibit FFF for identification.

Mr. LEMING. Now, this group which bears the paid stamp but does not bear the witness' initial, I believe, consists of 21, those which have the paid stamp but do not have the witness' initial on them. Will you mark them for identification as one group?



By Mr. LEMING:

Q. Now, Mr. Jones—

The MEMBER. Just a moment. Let us get the identification in the record.

The CLERK. 21 have been marked as "Respondent's Exhibit GGG" for identification.

(The documents referred to were thereupon marked "Respondent's Exhibit GGG," for identification.)

Mr. LEMING. Now, may I have all of the packages, please?

Mr. WHITE. How many are there in GGG, Mr. Clerk.

The CLERK. 21.

Mr. LEMING. There are 21. Here are 15 others which have the pay stamp but not the witness' initial. May those be marked—may those be included in the last group? There are 15 there and 21 have already been marked.

The CLERK. 36 in Exhibit GGG.

363 Mr. LEMING. Which bear the pay stamp but not the witness' initial. You had 36 in that?

The CLERK. Yes.

Mr. LEMING. There are three more. I am sorry to take up so much time on that, but I have not examined these personally.

The CLERK. 39 in GGG.

By Mr. LEMING:

Q. Now, Mr. Jones, I just want to be sure we have those segregated in that style. The remaining ones in these envelopes, have you checked those sufficiently to say they are ones that bear your initial?

A. No; they do not.

Q. They do not?

A. No; because I left the office early in 1925; around March. I do not know the exact date. My successor's initial is on some of these. I believe this gentleman just had a few of them. I am not positive but I believe it was March 1925, or April.

Q. Then, as to these receipts before you, I believe I asked you if you could identify them as the railroad records?

A. Oh, yes.

Q. And then in order to get this straightened out, at the risk of repetition, I would like to ask you this question again: As to all of those receipts bearing the letter "J" over the paid stamp, that is your initial and you took the money on those?

A. Yes.

Q. And you took the money?

A. That is right.

Q. All right. Now, that being the situation, I would like to have all of those receipts consolidated into one number for identification. Will you kindly mark all of the remaining re-



364 cepts for identification as one letter, and that will get them all into the record.

Mr. WHITE. These are all 1925, Mr. Leming?

Mr. LEMING. Are they all-1925, Mr. Jones?

The WITNESS. Yes.

The CLERK. There are ten envelopes of stubs being marked HHH for identification.

Mr. LEMING. There are 11 of the large Manila envelopes containing receipts which go into the last number. We thought we had 12 packages, but in getting them straightened out—

The CLERK. There is one on the table there.

Mr. LEMING. Here is the 12th one, which makes up the exhibit for identification.

(The documents referred to were thereupon marked "Respondent's Exhibit HHH," for identification.)

By Mr. LEMING:

Q. Now, Mr. Jones, taking all of those cashier's stubs, have you summarized there anywhere the total number of car-lot shipments and the month?

A. On each envelope it has, separated by months, the number of receipts on the inside written on the outside. For instance, there are 33 in that envelope—

Q. That is, the envelope you are pointing to now has, on the upper left-hand corner, January 1935-1934, and to the right and below that is 33, and that means the number of receipts in that envelope?

A. Exactly.

Q. And each receipt represents a carlot shipment, or shipment of a car?

A. That is right.

365 Q. Then, referring to all of the receipts, that is to each of the receipts, each receipt represents a carlot shipment?

A. That is right.

Q. Now, I show you ten large Manilla envelopes here which contain similar receipts for different years; will you kindly examine those and state if they are records of the railroad company at Kingston?

A. Do you want anything that is not a railroad record taken from these?

Q. That is right. I only want identified those matters which are cashier's stubs and which are railroad records. If you will just hand me anything that is not a railroad record there?

A. They all contain receipts of the same nature.

Mr. LEMING. May these ten packages be marked, please, as the next exhibit for identification?

The MEMBER. They may be so marked.



The CLERK. III for identification.  
(The documents referred to were thereupon marked "Respondent's Exhibit III," for identification.)

By Mr. LEMING:

Q. Now, in respect of these last receipts you have identified, does the same situation obtain there; that is, if your initial J appears on the receipt, that one was handled by you?

A. Exactly.

Q. But as to all of them you are in a position to say they are the railroad's records?

A. I am.

Q. Now, in the case of these receipts, Mr. Jones, do you  
366 say they mean that a car of freight was shipped or that freight was paid on a car of freight in each instance?

A. Yes.

Q. And the railroad company received the freight money?

A. Yes.

Q. Can you state in respect of any of these receipts the identity of the person or persons who paid the freight?

A. Do you mean to take an individual receipt and say a certain person paid it?

Q. Yes; I think that is perhaps what you would have to do, unless you are in a position to say that you know of your own personal knowledge that the payment on these receipts before you was made in part by individuals whom you can identify?

A. I can say that all of the moneys that I collected in connection with these receipts came from one of four or five people.

Q. Well, can you say that the money came from one or the other of the four?

A. Yes.

Q. That is, the four together paid the freight?

A. Yes.

Q. Some paying at one time and some at another?

A. Yes.

Q. And would that apply in respect of all of the receipts before you?

A. All that I handled the money on.

Q. All that you handled the money on?

A. Yes.

Q. All right. Will you kindly state the names of those four persons?

A. Billy McHugh, Tom Kehoe, a man by the name of Kearns.

367 Q. Anyone else?

A. I said four, I was wrong; it is three.



Q. Can you state in respect of the cars used in the cases where you received the freight, by whom the cars were ordered?

A. All that I handled, the orders were given by any of those same three men.

Q. That is, by one or the other of those three men?

A. Yes.

Q. That is W. F. McHugh, Thomas Kearns, and Thomas Kehoe?

A. Right.

Mr. LEMING. You may examine, Mr. Gillespie.

Mr. GILLESPIE. Your Honor, would you permit us to reserve our cross examination of this witness until we have had some opportunity to look at these exhibits? Perhaps we could do so at the noon recess and then recall him for cross examination.

The MEMBER. It would seem that would be reasonable.

Mr. LEMING. I have no objection; I have discovered myself how difficult it is to handle those papers and get them marked for identification. So I have no objection to that.

The MEMBER. If there is nothing further of this witness at this time he may be excused now.

Mr. GILLESPIE. We reserve the right to recall him for cross examination.

The MEMBER. Probably after the noon hour.

(Witness excused.)

368 . . . Whereupon WILLIAM M. MULLAGHY was called as a witness by and on behalf of the respondent and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mr. Mullaghy, where do you live?

A. 443 Chestnut Street, Kingston, Pennsylvania.

Q. How long have you resided there, Mr. Mullaghy?

A. With the exception of two years, from 1930 to 1932, I have resided there since 1921.

The MEMBER. What year was that?

The WITNESS. 1921.

By Mr. LEMING:

Q. And what has been your occupation during that time, Mr. Mullaghy?

A. Since 1921?

Q. We will say beginning with the year 1924.

A. I was Yardmaster employed by the Lackawanna Railroad at Kingston up to November 24, 1924, and then I was appointed General Yardmaster and I have held that position ever since, at the same place, at Kingston.



Q. At the same place?

A. Yes.

Q. What was the difference in duties as between Yardmaster and General Yardmaster?

A. A general yardmaster's duties are to designate what cars will do certain work, and the yardmaster's duties are to see that those cars do that work.

Q. Now, there have been produced here, Mr. Mullaghy, by Mr. Jones, the witness who has preceded you, a large number  
369 of cashier's stubs which have been identified as railroad records and which on their face show the payment of freight to the railroad company for carlot shipments; will you kindly examine those, please, and state where that freight originated: those in the year 1925, if you can?

A. May I explain something to you?

Q. Yes, sir:

A. These papers all represent money collected for carloads of freight. I never see any of those things because I have not anything to do with money. All my work is, when the agent makes a revenue way bill for a carload of freight, he sends that down to my office and that is my authority to move that carload of freight and line it up in a train that will take it towards its destination in the least possible time.

Q. Now, when the cashier's stub is issued for freight, is the waybill a copy of that, or does it contain the same information as the cashier's stub?

A. Yes, sir.

Q. So would these cashier's stubs here indicate to you that carload shipments moved as per the receipts for the freight?

A. Yes, sir.

Q. Now, that being so, can you state the point of origin of the carload shipments indicated by those cashier's stubs?

A. Yes.

Mr. WHITE. If he knows.

The MEMBER. He said yes.

By Mr. LEMING:

Q. And what would that be, Mr. Mullaghy?

A. And we will take this, for instance: On another form, which we term in railroad circles a revenue waybill, there is an exact duplicate of this [indicating], only on a different form,  
370 and that is what the car travels on. It shows the commodity, it shows the weight and also the amount of freight and whether it is paid at source or will be paid at destination. As far as money is concerned, my department has not anything at all to do with the collection of money.



Q. I understand that.

A. But on every one of these there has been a car moved from Kingston.

Q. From Kingston?

A. Kingston, Pa. And whatever the commodity on these receipts, they show, as far as I know, that car was loaded with that commodity and went to the destination shown on these cashier's stubs.

Q. Well, now, where would—can you state upon examination of those cashier's stubs where that freight originated.

A. Of course, I have not examined all of these stubs and I do not know what the commodities are, but every cashier's stub there that shows cereal beverage was loaded at the McGowan Brewing Company siding at Edwarsville, Pennsylvania.

Q. May I see these a moment, please? Your answer is in respect of the receipts which were before you for the year 1925?

A. Yes, sir.

Q. Mr. Mullaghy, do you know John Kehoe?

A. I have met him; yes, sir.

Q. Do you recall when you were first introduced to him?

A. In 1924.

Q. Will you state the circumstances under which you were introduced to him?

A. I was introduced to Mr. Kehoe in Evan Jones' office in Wilkes-Barre sometime in the latter part of 1924. I should  
371 judge between eight and nine o'clock in the evening.

Q. By whom were you introduced to him?

A. William F. McHugh.

Q. What was said by either Mr. McHugh or Mr. Kehoe at that time; at the time of your introduction?

A. Mr. McHugh introduced me to John Kehoe as his boss.

Q. Was that remark made in the presence of Mr. Kehoe?

A. Yes, sir.

Q. And in your presence?

A. Yes, sir; right prior to the introduction.

Q. Now, what was the purpose of your going to Evan Jones' office that night?

A. There were cars of beer confiscated by the Prohibition Department agent at Kingston yards, so it seemed to me they were going to have some kind of a hearing about it, so the evening before the hearing was scheduled William F. McHugh came to my office and he had some kind of a statement, and asked me to read it, and I read it—

Mr. GILLESPIE. Just a moment; you are approaching a conversation with Mr. McHugh.

Mr. LEMING. We have laid the foundation of it, if there was ever one laid.



Mr. GILLESPIE. No foundation laid by a conversation with McHugh.

Mr. LEMING. I am on sure-footed ground now.

The MEMBER. He handed you a paper?

The WITNESS. Yes; your Honor.

The MEMBER. And he asked you to read it?

The WITNESS. Yes, sir.

372 The MEMBER. The objection will be overruled. You may answer.

Mr. GILLESPIE. An exception, please.

The MEMBER. Exception will be noted.

By Mr. LEMING:

Q. All right, continue, Mr. Mullaghy.

A. I asked William F. McHugh what the statement was.

Mr. GILLESPIE. Pardon me, I must object again to conversation in the absence of Mr. Kehoe.

The MEMBER. Objection will be overruled.

Mr. GILLESPIE. Exception.

The MEMBER. Exception noted.

By Mr. LEMING:

Q. Continue, Mr. Mullaghy.

A. McHugh advised me this would be a copy of my testimony. I was supposed to testify to the following day. I refused to do it. So then he advised me of this meeting that was to be held in Mr. Jones' office at Wilkes-Barre, and asked me if I would come over. I said "Yes; I will go over." So, I went over and we were in an outer office for I should say 15 minutes, and Mr. McHugh escorted me to an inner office, what I termed a private office, and he said to me, "I would like to have you meet my boss."

Mr. GILLESPIE. Pardon me for interrupting again. I object to the conversations or statements made in the absence of Mr. Kehoe as irrelevant and immaterial, and against the rules of evidence permitting statements or conversations to be offered in evidence in the absence of the party affected.

373 The MEMBER. There has been evidence of agency put in this record, and certainly under certain circumstances the agent is permitted to bind his principal, and admissions made by the agent without regard to the presence of the principal will be binding on that principal, where the agency is shown. There is testimony in this record to show that agency, and the objection will be overruled.

Mr. GILLESPIE. May I add, with your Honor's permission, we respectfully submit that agency has not been sufficiently estab-



lished in this case to warrant the application of the rule in question, as to which there can be no doubt.

The MEMBER. That will be a question for us to determine, if there is testimony in the record connecting it up, and that we feel it is our problem to determine.

Mr. GILLESPIE. We realize that. We note an exception.

The MEMBER. Exception noted.

By Mr. LEMING:

Q. Have you concluded your answer, Mr. Mullaghy?

A. Well, the only thing I can tell you that he introduced him to me.

Q. What conversation ther did you have with Mr. Kehoe?

A. Well, after the introduction McHugh told Kehoe who I was and what I was, and Mr. Kehoe said, "Oh, yes; I know some of your relatives quite well." That was the entire conversation with Mr. Kehoe.

Q. Well, what further was said or done about the hearing, if anything?

374 A. Mr. Jones took me over in one corner of his office and wanted to know if I was holding out for a price.

Mr. GILLESPIE. Just a moment, please, may I object to that for this reason, admitting that as your Honor has suggested the agency rule applies with reference to conversation had by an agent with others as affecting and binding upon the principal, that does not apply to Mr. Jones. There is no evidence whatever that Mr. Jones represented John Kehoe. He surely was not his agent, and you cannot have an agent and sub-agents ad infinitum, and bind the principal under that rule. I think that can be hardly argued seriously.

Mr. LEMING. May I ask this to clear the situation—

Mr. GILLESPIE. Just a moment; in addition to that Mr. Kehoe personally was not present.

The MEMBER. I thought Mr. Kehoe was present.

Mr. LEMING. I was just going to ask the witness if it was not in the same room with Mr. Kehoe there at the time.

The MEMBER. You may ask him, and we will rule on the question.

By Mr. LEMING:

Q. Now, was this in the same room where Mr. Kehoe was at the time?

A. Yes, sir.

Mr. GILLESPIE. And in his presence?

The WITNESS. Yes, sir; the same room.

Mr. GILLESPIE. Presence and hearing?



By Mr. LEMING:

Q. As I understand, Mr. Jones, after your conversation with Mr. Kehoe, called you aside?

375 A. Yes, sir.

Q. In the same room?

A. Yes, sir.

Q. Still in the presence of Mr. Kehoe in that room?

A. Yes, sir.

Q. Was Mr. McHugh still in that room?

A. Yes, sir.

Mr. GILLESPIE. Pardon me, are you speaking of Mr. McHugh or Mr. Kehoe?

Mr. LEMING. I think the record will show quite clearly, I said Kehoe.

The MEMBER. Go ahead, I think everything is clear.

Mr. LEMING. Now, will you please read the question and the answer as far as it goes?

(Thereupon the reporter read the pending questions and answer as follows:

"Q. Well, what further was said or done about the hearing, if anything?

"A. Mr. Jones took me over in one corner of his office and wanted to know if I was holding out for a price.")

The MEMBER. Now, is that all of the question and answer?

Mr. LEMING. I do not think that the witness had completed his answer when the objection was made.

Mr. GILLESPIE. It was important to make the objection at that time. Now, my objection was that he must show that it was not only in the presence but the hearing of Mr. Kehoe, before any statement by Jones would be admissible, and we must object again to that on the ground that Evan C. Jones was not  
376 his counsel or his agent. That must be shown affirmatively.

The MEMBER. How large was this room, Mr. Mullaghy?

The WITNESS. Well, I would say from what I remember now the length of it extended from about the corner of your desk to that wall there and it may have been from that wall to the further end of this picture here [indicating].

The MEMBER. Were Mr. McHugh and Mr. Kehoe still in that room?

The WITNESS. Yes, your Honor.

The MEMBER. Did this conversation include them, or was it a private conversation between you and Mr. Jones?

The WITNESS. Just Mr. Jones and I held the conversation.

The MEMBER. Was it within hearing of Mr. Kehoe?

The WITNESS. Well, we talked in ordinary tone of voice.



Mr. GILLESPIE. May I suggest that your Honor ask him, since you are asking him, if in his opinion that tone of voice could have been heard, or was heard, if he knows.

The MEMBER. Was it a tone of voice that could have been reasonably heard by Mr. Kehoe in a room of this size?

The WITNESS. I would say it was a tone of voice that could be easily heard by a man of ordinary hearing.

The MEMBER. Did Mr. Kehoe make any comment or any remark?

The WITNESS. No; your Honor.

377 Mr. GILLESPIE. And whether he knows Kehoe did know it by any manifestation?

Mr. LEMING. Well, he has answered that.

The MEMBER. The objection will be overruled, and the answer will be allowed to stand.

Mr. GILLESPIE. Exception.

The MEMBER. Exception noted.

By Mr. LEMING:

Q. Had you finished your answer, Mr. Mullaghy? He had asked you if you were holding out for a price; what did you say?

A. I told Mr. Jones very emphatically not to insult me.

Q. Not to insult you?

A. Yes. I went out directly after that.

Q. You went out right after that?

A. Yes, sir.

Q. Did you attend the revocation hearing?

A. No, sir.

Mr. LEMING. You may take the witness.

Cross-examination by Mr. GILLESPIE:

Q. Mr. Mullaghy, who asked you to go to Attorney Evan C. Jones' office?

A. William F. McHugh.

Q. Where was that?

A. In my office in the D. L. & W. Station, Kingston.

Q. Yardmaster's office?

A. Yes, sir.

Q. And you say that at that time he showed you a paper containing or purporting to contain certain information he wanted you to give to his attorney, Evan C. Jones?

378 A. He showed me this paper just prior to asking me to go to Mr. Jones' office.

Q. Was it on the occasion of that visit?

A. Yes.

Q. That is what I asked.



A. Yes, sir.

Q. And you looked it over and said, "Nothing doing," something to that effect?

A. Yes, sir.

Q. But, nevertheless, you did go to Evan C. Jones' office in Wilkes-Barre pursuant to Mr. McHugh's request?

A. Yes.

Q. Did you go there with him or alone?

A. No, I went with another fellow. Another fellow came up after me and took me in his car.

Q. And drove you down to the office of Mr. Jones?

A. Yes, sir.

Q. When you went in there Mr. McHugh was in Mr. Jones' room, or suite of rooms?

A. Yes, sir.

Q. And there you say you saw Mr. Kehoe?

A. Not in the suite; not in the first room we went in.

Q. You met him in one of the rooms?

A. Yes, sir.

Q. Probably outside of the waiting room?

A. Well, it appeared to me what I would term a private office.

Q. He was sitting there when you came in?

A. Yes, sir.

Q. And McHugh was there too?

A. He brought me in.

Q. He brought you into that office?

A. Yes, sir.

379 Q. But you met McHugh in the outer office?

A. Yes, sir.

Q. And when you came to the office where Mr. Kehoe was he introduced you to him?

A. Yes, sir.

Q. And said "This is my boss"?

A. Yes, sir.

Q. You do not mean to say he intended to have you understand he was his boss in the brewery?

A. I do not know what Mr. McHugh's intentions were.

Q. You will not say there was any such intention from your own personal knowledge?

A. I couldn't say what Mr. McHugh's intentions were.

Q. As far as you know now, he might have been his boss in the Kehoe Electrical Construction Company?

A. He might have been his boss in anything as far as I know.

Q. You have got no impression of the kind of boss he was other than McHugh said he was his boss?

A. No, sir.



Q. Now, did you see Mr. Evan C. Jones there at the same time?

A. Yes, sir.

Q. When Mr. McHugh introduced you to Mr. Kehoe?

A. Yes, sir.

Q. In this big room?

A. Yes, sir.

Q. Would you say it was a private office?

A. Yes, sir.

Q. And Mr. Jones was then introduced to you too or you to him?

380 A. No; I had met Mr. Jones prior in the outer office.

Q. And that room which you described in answer to a question by his Honor, you indicated by the positions of his Honor's desk and the side wall. Now, to get on the record the number of feet as showing the dimensions of that office, would you kindly give us your own estimate to the best of your ability?

A. I think that you could draw your conclusions as well as I can as to the number of feet. I am not a carpenter. I don't know what the number of feet are unless I would measure it.

Q. My estimate might be colored slightly because of the fact that I am counsel for the petitioner, and you are an independent and unprejudiced witness and we must ask you about that, and with the permission of the Board will you tell us so that we may have something on the record to show the size of the room? We want to have this on the record, your Honor, because it is a material issue as no doubt your Honor sees.

The MEMBER. Do you want him to make the measurement of this space here?

Mr. WHITE. Yes.

Mr. GILLESPIE. To show how far apart the parties may have been when this conversation went on. That is what I am leading up to.

The MEMBER. We can measure it, and you can agree on that.

Mr. WHITE. Will that be all right, Mr. Leming?

Mr. LEMING. If your Honor please, I'm like Mr. Mullaghy. I am not a carpenter, or a designer either, and if I were sitting over here with Mr. Mullaghy, and looking over there in a  
381 room as large as this my vision might be distorted. We might take the measurements of this entire room. One's

vision is always regulated to some extent by the space within which he is then encompassed, and if he attempts, in the center of a large space, to define it by pointing out the pictures on the wall and the window sill, and the corner of a desk, his vision will be measured, or his estimate influenced by this great space in which he is. Now, I would have no objection to a photograph being taken of the Court Room which will show the picture on



the wall, and the desk and the whole thing. I think that the best thing is to have a photograph made from this side looking that way [indicating], so that one would get the whole interior, and show the witness on the stand, and where he was when he made that estimate. That is the only fair thing, it seems to me, for the record to show.

Mr. GILLESPIE. I do not want to argue that question.

Mr. LEMING. It is not my request for a photograph, but I say if there is any measurement to be taken, that is the best way to do it.

Mr. GILLESPIE. That is not the point. The point is, what is the size of that room as far as the witness can tell.

The MEMBER. The question asked the witness called for his impression, his idea or his approximation.

Mr. GILLESPIE. That is the idea.

The MEMBER. You are privileged, of course, to ask him questions with reference to his general impression as to the size of the room.

Mr. GILLESPIE. Using as a basis what he has already testified to on Mr. Leming's direct examination.

382 By Mr. GILLESPIE:

Q. Will you try to do that, Mr. Mullaghy, in fairness to both sides, give us an estimate or your best thought or judgment as to the size of that room using the space you have already alluded to as the basis for that?

Mr. LEMING. You are asking what his recollection is of the dimension of the room in feet?

Mr. GILLESPIE. In feet, of course; otherwise it is no use.

Mr. LEMING. In other words, you are asking him as to the dimensions of the room he was in, by feet?

Mr. GILLESPIE. Certainly; that is all there is to it. That must go on the record, otherwise it means nothing.

Mr. LEMING. I have no objection to that.

Mr. GILLESPIE:

Q. Now, will you do your best?

The MEMBER. Give your impression of what you think was the size of that office you were in to the best of your ability.

The WITNESS. 12 x 12.

Mr. GILLESPIE:

Q. Now, Mr. Mullaghy, Mr. Kehoe I suppose was sitting by Mr. McHugh while you and Attorney Jones were talking; is that right?

A. Mr. Kehoe was sitting at a desk, and Mr. McHugh was standing on one side of the desk, and Mr. Jones and I were in an off corner.



Q. Away from the point where Mr. McHugh and Mr. Kehoe were sitting or standing?

A. Yes, sir.

Q. Were they talking, Mr. Kehoe and Mr. McHugh, by themselves while you and Attorney Jones were in an off corner by yourselves?

383 A. I couldn't say whether they were talking. I was listening to Mr. Jones.

Q. Did Mr. Jones walk away from where Mr. Kehoe and Mr. McHugh were to take up his conversation with you?

A. Yes, sir.

Q. He walked away from them?

A. Yes, sir; from the desk.

Q. Over to the off corner?

A. Yes, sir; he and I together.

Q. And you and he stood in that off corner and talked?

A. Yes, sir.

Q. He apparently left Mr. Kehoe and Mr. McHugh so you and he might have a confidential talk together?

A. Yes, sir.

Q. Outside of the hearing of apparently Mr. Kehoe or Mr. McHugh?

A. I don't know anything about the hearing of Mr. Kehoe or Mr. McHugh at that time.

Q. But, in respect to what you said a moment ago, to make that clear, he walked away from Mr. Kehoe and Mr. McHugh at his desk into that off corner, as you said, to talk to you?

A. Yes, sir.

Q. In a confidential way?

A. In a natural tone of voice.

Q. I didn't ask you that. You are volunteering that, Mr. Mullaghy.

A. You volunteered it was confidential, didn't you?

Q. I am asking you. I am not volunteering anything. You walked off there to the off corner you said to have a confidential or private talk; that is correct?

384 A. That is your idea of the talk.

Q. I am asking you if that is correct?

A. That is not my idea of the talk.

Q. What is your idea?

A. I stated very specifically before he talked to me in a natural tone of voice.

Q. I admit you did, without quarrelling, but I am asking you if what you said was, you and he walked to an off corner to have a confidential and private talk?

Mr. LEMING. He did not say confidential.



Q. I asked if that was true, and you said it was correct.

A. I don't recollect you saying that.

Q. I am asking you now when you and he walked off from his desk, and walked to an off corner?

A. Mr. Jones and I walked about four steps from the desk.

Q. To a corner?

A. Towards a corner, Mr. Jones and I did, and then Mr. Jones asked me what I have testified.

Q. Previously you had been at the desk talking?

A. Yes; before.

Q. And you had been at the desk, and walked off to the off-corner?

A. Yes; about four steps.

Q. Away from the desk?

A. Towards the off corner, not in the off corner.

Q. Towards, we will take it that way, if you say so.

A. Yes, sir.

Q. Then he did have this talk with you which you say you rejected; is that right?

A. Why, surely it is right; I just testified to it.

Q. And you did testify just a moment ago, did you not, that you and he walked to an off corner?

385 A. Towards an off corner.

Q. You did so testify a little while ago?

A. Yes.

Q. And in answering to my question as to whether or not you walked off to that off corner, or towards that off corner to have a private and confidential conversation together, you said yes; did you not?

A. I don't remember saying that.

Mr. GILLESPIE. I ask permission of your Honor to have the question and answer repeated so as to make it a part of my record in this question.

Mr. LEMING. Well, whatever he said is in the record.

The MEMBER. Do you want to refer back to the previous question?

Mr. GILLESPIE. Yes; my question with reference to the sum and substance of what I said.

(Thereupon the reporter read the question and answer referred to as follows:

"Q. He apparently left Mr. Kehoe and Mr. McHugh so you and he might have a confidential talk together?

"A. Yes, sir.")

Mr. GILLESPIE:

Q. I was correct in saying you did so swear?



A. Yes; and I apologize to you.

Mr. LEMING. Now, might the witness' place where he said you volunteered it was confidential be read?

Mr. GILLESPIE. This is my cross-examination.

Mr. LEMING. We should have the benefit of the record also.

386 Mr. GILLESPIE. You may take over the witness on re-direct examination to straighten out anything he cares to.

Mr. LEMING. I am just trying to put the record straight. Answers of yes or no may not include everything stated in the question. I think we all know something about that type of answer.

The MEMBER. I think the witness can take care of himself.

Mr. GILLESPIE. I think so, too, your Honor, I am not trying to puzzle him.

Mr. GILLESPIE:

Q. Now, in any event he made some proposition to you which you resented?

A. Yes, sir.

Q. And if that is true you properly resented it, I admit.

A. Yes, sir.

Q. And you walked out and left them about that time?

A. Yes, sir; directly afterwards.

Q. Naturally you left the room; you didn't stay there all night?

A. No.

Q. Now, in speaking of the dimensions of the room you first illustrated it by pointing out dimensions in this room, that is true?

A. Yes, sir.

Q. And then you gave in your own words, to the best of your judgment and to the best of your recollection what you thought were the dimensions of that office in feet?

A. Yes, sir.

387 Q. Now, if you are correct in that, let me call your attention to this. You said there was a desk in that room?

A. Yes, sir.

Q. About which the three of you were standing or sitting first?

A. One sitting and three standing.

Q. And from that desk you and Mr. Jones walked to an off corner, I mean using your words?

A. Yes, sir.

Q. Towards an off corner—I want to be perfectly exact—four spaces?

A. Approximately. It may have been four or five.

Q. It may have been five or six?



A. You know it has been ten years since I walked that distance.

Q. You would not say it was three or four steps; it might have been more?

A. Surely, and it might have been less.

Q. And if it was three or four steps from the desk, it might have been ten feet, might it not?

A. Oh, no.

Q. Three feet to a step?

A. Sometimes, but when you are walking along with a fellow, sometimes you will only take a step six inches.

Q. Did you have hold of Mr. Jones' arm?

A. No; he had hold of mine.

Q. Leading you on?

A. Yes.

Q. Leading you on to the slaughter apparently; apparently his intention was to lead you away from Mr. McHugh and Mr. Kehoe?

A. I cannot testify to what Mr. Jones' intentions were.

Q. I am simply asking you about his acts and movements; apparently it was his intention to lead you away from that desk to have a talk without their hearing?

A. You will have to ask Mr. Jones that.

Q. Don't instruct me. I will have Mr. Jones here if I can get him, if he is out of the hospital. Now, that, however, would be the natural impression on you, that he walked away from there holding you by the arm so that he might have a chat with you privately, to make an offer such as you said he made, is that not right? Do you get my question?

A. I get your question fine.

Mr. LEMING. May I suggest this, that the witness did not say he made an offer. Now, if you want to be precise as to what the witness said, let's do not get him confused again by yes or no. That is not what he said. He did not say he made him an offer.

Mr. GILLESPIE:

Q. Will you kindly answer my question, Mr. Mullaghy, regardless of what you said or thought a few moments ago; will you kindly give your present impression in answer to my question?

A. Will you please repeat it?

(Thereupon the reporter read the pending question as follows:

"Q. Now, that, however, would be the natural impression on you, that he walked away from there holding you by the arm so that he might have a chat with you privately, to make an offer such as you said he made, is that not right? Do you get my question?")



A. I cannot agree with you.

Q. You had no such impression at the time?

A. No, sir. It came to me like a thunderbolt when he handed me, "Are you holding out for a price?"

389 Q. When he made such a proposition to you, which you say came to you like a thunderbolt, it made a very distinct impression upon you, did it not?

A. I will say it made a very distinct impression.

Q. Will you kindly take the question seriously, without smiling.

A. Yes.

Q. And isn't it your impression that he led you off to make this proposition to you privately, so as not to be overheard?

A. The state of mind I was in after that proposition was put to me, I don't know what my impressions were.

Q. You were pretty hazy about that?

A. Not hazy. I was very sore after the proposition was put to me.

Q. You felt outraged, and particularly, coming from a man you knew to be decent and respectful and one of the most reputable lawyers in the State of Pennsylvania; that, of course, outraged you?

A. Yes, sir.

Q. And you did know, to be fair, that Mr. Evan C. Jones, a brother of Judge Jones of Wilkes-Barre, is one of the leading lawyers of the State of Pennsylvania?

A. That is his reputation as far as I know.

Q. And if he had made any such proposition as you say he made, he would not want to be overheard by two other men in that room?

A. I don't know.

Q. Now the table that you speak about being in that room was a pretty large table or desk?

A. An ordinary desk.

Q. To the best of your recollection it was a large desk?

390 A. An ordinary desk, flat-top desk.

Q. Could you say how wide or long it was?

A. No, sir.

Q. You have no idea?

A. It was an ordinary flat-top desk.

Q. Was it as large as the desk in your office?

A. No; not by far.

Q. You have a very large desk?

A. Yes, sir.

Q. How large is that?

A. As long as these two put together here.

Q. Give us an idea about this.



A. The length of them.

Q. Give us an idea about the length of these two desks or tables?

A. I should say about 16 feet long is my estimate.

Q. Each one?

A. No; both of those together.

Q. And his desk by way of comparison was about how long? To the best of your recollection?

A. About four feet.

Q. Long?

A. Yes.

Q. How wide?

A. About as wide as this table.

Q. It was a very small desk?

A. You will have to ask Mr. Jones.

Q. I am asking you. I am examining you, and not Mr. Jones. Will you answer my question?

A. I did to the best of my ability.

Mr. GILLESPIE. Let me say for the record that the witness here is interfering with my questions and therefore I cannot get an intelligent answer from him.

391 The MEMBER. It seems to me he is doing the best he can, Mr. Gillespie.

Mr. GILLESPIE. Will the reporter please read the question. (Thereupon the reporter read the pending question.)

The MEMBER. He has asked if it was a very small desk.

The WITNESS. Yes, your Honor.

Mr. GILLESPIE. That is all as far as we are concerned.

The MEMBER. Anything further of this witness?

Mr. LEMING. You may be excused from the witness stand, Mr. Mullaghy. We have no further questions.

(Witness excused.)

Mr. LEMING. If your Honor please, these exhibits marked for identification, Respondent's Exhibits FFF, GGG, and HHH, being the cash stubs for freight shipments, I intended to offer them before. I turned Mr. Mullaghy loose. Counsel has agreed that no objection will be made to the offer now.

Mr. GILLESPIE. With the understanding that we will go over them at noon time and make any objections we find as to their competency.

The MEMBER. They may be admitted and marked Respondent's Exhibits FFF, GGG, and HHH.

(The documents referred to were received in evidence and marked, respectively, "Respondent's Exhibits FFF, GGG, and HHH," and made a part of this record.)



Mr. LEMING. The triple I group relates to the year 1924. The other related to the year 1925. I am not offering those at this time; I believe I will offer them. I offered Respondent's Exhibit III, for identification also, the ones identified by the Witness Jones.

Mr. GILLESPIE. Subject to the same right.

The MEMBER. They will be admitted as Respondent's Exhibit III.

(The document referred to was received in evidence and marked "Respondent's Exhibit III," and made a part of this record.)

The MEMBER. We will recess at this time for lunch, and come back at 1:30.

(Thereupon a recess was taken at 12:15 p. m., until 1:30 p. m.)

#### AFTERNOON SESSION

The hearing was resumed at 1:45 o'clock, p. m., pursuant to recess.

Mr. LEMING. Counsel are ready for cross-examination of Mr. Jones, they say.

Mr. GILLESPIE. May we proceed, your Honor?

The MEMBER. You may proceed.

PAUL T. JONES was recalled as a witness by and on behalf of the respondent and, having been previously duly sworn, testified further as follows:

Cross-examination by Mr. GILLESPIE:

Q. Mr. Jones, I call your attention to a document marked Petitioner's Exhibit No. 1, in which it is certified by the Assistant Secretary of the Treasury as follows:

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#### *Petitioner's exhibit 1*

"United States of America, Treasury Department, August 13, 1934.

"Pursuant to Section 882 of the Revised Statutes I hereby certify that the annexed is a true copy of claim for reward, Form 211 (with statement attached, executed by George N. Murdock, Willette, Illinois, March 29, 1932, for information furnished in connection with alleged violation of income tax laws by John Kehoe, 12th Pennsylvania Collection District, on file.

"In witness whereof I have hereunto set my hand and caused the seal of the Treasury Department to be affixed on the day and year first above written.

"W. W. Robert, Jr., Assistant Secretary of the Treasury."

And attached thereto is a photostatic copy of a form headed "United States Internal Revenue, Claim for Refund Under Cir-



cular 99 and Revisions," in which is set forth the following statement:

"Post office address of Claimant, 2111 Birchwood Avenue, Wilmette, Illinois.

"Please send draft in care of George N. Murdock."

And then follows the following statement:

"I, George N. Murdock, being duly sworn, depose and say that according to the best of my information and belief I am entitled to the reward offered by the Commissioner of Internal Revenue under Circular 99 or its revisions, for having given the first information which led to the defection of John Kehoe for violation of the Internal Revenue Laws, by John Kehoe in the 12th

Collection District, State of Pennsylvania, and to the recovery of a large sum of money, the total amount as yet unascertained, being for fines, penalties, taxes, and interest, which information was furnished by me to revenue officials on the 4th day of June 1929, I not being an officer of the Internal Revenue nor appointed or employed in or acting in connection with the Internal Revenue service when said information was obtained and furnished. I now apply for said reward and claim one-tenth of the total amount recovered, signed George N. Murdock.

"Sworn and subscribed to before me this 29th day of March A. D. 1932.

"B. E. Lynn."

"B. E. Lynn."

That is what I make the name out to be, Lynn.

Mr. LEMING. Whatever it is that is shown there.

By Mr. GILLESPIE:

Q. There is also a statement attached purporting to be made by George N. Murdock, setting forth therein an alleged agreement to which is attached, in print, the names, Patrick F. McGowan, 92 McCarragher Street, Wilkes-Barre, Pennsylvania, Paul T. Jones, 28 Division Street, Kingston, Pennsylvania, and George N. Murdock, 112 West Adams Street, Chicago, Ill. I show you this document from which I have read and to which I have referred and ask you to examine it, particularly with reference to the statement, or inclusion of an alleged contract, in quotations, which portion I ask you to read.

Mr. LEMING. Do you want him to read it to himself?

Mr. GILLESPIE. Yes.

The WITNESS. Yes.

395 By Mr. GILLESPIE:

Q. You have read it?

A. Yes.



Q. May I ask you if you are the Paul T. Jones named in this contract quoted in the document?

A. I am.

Q. And the facts therein set forth are true and correct—

Mr. LEMING. Just a minute, if your Honor please.

Mr. GILLESPIE. Will you let me finish the question?

Mr. LEMING. All right, finish the question.

By Mr. GILLESPIE:

Q. With relation to your being interested as a claimant for any reward which may be paid out as a result of the recovery, fines and penalties from John Kehoe in this proceeding?

Mr. LEMING. Now, if your Honor please, this document which counsel has exhibited to the witness is Petitioner's Exhibit No. 1, in evidence without objection. I have refrained from saying anything heretofore, assuming we would get to the point where the witness would say he is the same Paul Jones named in the document, and that has been done. Now, this witness' direct examination related only to particular matters in connection with the identification of certain records and further to the persons who paid freight in the cases of those receipts personally handled by him. I submit that the appropriate cross-examination here is in respect of those matters inquired into on direct examination only.

396 Mr. GILLESPIE. In order to save your Honor's time,

I will withdraw my question, inasmuch as the witness has said he is the identical Paul Jones named in this contract. I will let it rest at that because the document is already in evidence.

The MEMBER. Very well.

Mr. GILLESPIE. Except I would like to ask one question with your Honor's permission, which has been suggested by counsel to me.

The MEMBER. Very well.

By Mr. GILLESPIE:

Q. The person named as George N. Murdock does represent you in relation to this matter of any future reward as set forth in this document?

A. Yes.

Mr. GILLESPIE. That is all. We are through with the witness.

Mr. LEMING. That is all of the cross-examination of this witness?

Mr. GILLESPIE. Yes, sir; as far as I know.

Mr. LEMING. All right.

(Witness excused.)



Whereupon:

Mr. ANGELA TERESA FINNERAN SEWARD was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mrs. Seward, will you state your full name, please?

A. Mrs. Angela Seward.

397 Q. Does that include your initials, or all of your full name?

A. Mrs. Angela Teresa Finneran Seward.

Q. When were you married, Mrs. Seward?

A. Six years last November.

Q. Six years last November?

A. Yes.

Q. Up to that time, then, your name was what?

A. Finneran.

Q. Angela Teresa Finneran?

A. Yes.

Q. And where do you live, Mrs. Seward?

A. 49 Curtis Street, Pittston, Pa.

Q. How long have you lived there?

A. About a year and a half.

Q. You mean at that particular address?

A. Yes; at that particular address.

Q. How long have you resided in Pittston altogether?

A. Practically all my life.

Q. Practically all your life?

A. Yes.

Q. And you are over 21 years of age?

A. Yes; I am.

Q. And where are you now employed, Mrs. Seward?

A. In the Internal Revenue Department, in the audit section.

Q. And that is in the office of the Collector of Internal Revenue at Scranton, Pennsylvania?

A. It is.

Q. And how long have you been employed there?

A. About two weeks.

Q. Two weeks?

A. Yes.

398 Q. Now, going back to when you first started work—what is your profession, are you a stenographer and typist?

A. I am.

Q. And you do secretarial work?

A. Yes.



Q. How long have you been doing that class of work, Mrs. Seward?

A. I should say about 15 years.

Q. About 15 years?

A. Yes.

Q. Where did you start in as a stenographer and typist?

A. In Pittston.

Q. With whom did you start?

A. My first position was with an automobile concern.

Q. At Pittston?

A. Yes.

Q. From that position, where did you go?

A. To Mr. Kehoe's office.

Q. Mr. John Kehoe's office?

A. Yes.

Q. In Pittston, Pennsylvania?

A. Yes.

Q. And do you recall that date?

A. Yes; June 18, 1919.

Q. June 18, 1919?

A. Yes.

Q. And how long then did you continue in his office?

A. Until June 1, 1929.

Q. That is a period of—

A. Ten years.

Q. Ten years? And what were your duties as an employee in Mr. Kehoe's office?

399 A. I was employed as Mr. Kehoe's secretary. I wrote all of his personal business.

Q. You took dictation from him?

A. Yes.

Q. And wrote his letters?

A. Yes.

Q. And attended to whatever other secretarial duties were necessary in the office?

A. Yes.

Q. Did you have anything to do with his books of account?

A. Yes.

Q. Did you keep his books?

A. Yes; I did.

Q. And did you have anything to do with his income-tax returns?

A. Yes; I made them out.

Q. You made them out?

A. Yes.

Q. And did you make them out upon the data that was furnished you by him and as shown by his books?



A. Yes.

Q. Were you also a notary public?

A. Yes; I was.

Q. That is, during the same period of time you were in his office, some or all of the time?

A. During part of the time; I should say about eight years.

Q. Have you seen Mr. Kehoe sign his name?

A. Yes; I have.

Q. Have you seen him sign his name a good many time?

A. Yes.

Q. Are you familiar with his handwriting?

A. Yes; I am.

400 Q. I show you a document entitled, "Individual Income Tax Return for the Calendar Year 1923," and I will ask you to examine it. If you have completed your examination of that one, I will show you—the one you have just examined is captioned, "Individual Tax Return of John Kehoe for 1923"—

Mr. GILLESPIE, 1926?

Mr. LEMING, 1923.

By Mr. LEMING:

Q. I show you an individual income tax return for the calendar year 1924, captioned, "Mr. and Mrs. John Kehoe." I will ask you to examine that one. If you have finished examining that one, I will ask you to examine the next one, which is for the year 1925, in the name of Mr. and Mrs. John Kehoe. Having finished the examination of that one, I will ask you to examine this return, which is for the calendar year 1926, in the name of Mr. and Mrs. John Kehoe. Now, Mrs. Seward, will you kindly take these returns for 1923, 1924, 1925, and 1926 and state which of those returns bear your handwriting and which of them you prepared; are you ready to answer now, Mrs. Seward?

A. Yes; I am.

Q. Will you state which ones you prepared?

A. I prepared the 1924, 1925, and 1926; I did not prepare this 1923 return.

Q. All right, thank you.

Mr. LEMING. May all of these four returns be marked for identification with separate identification numbers?

The MEMBER: They may be marked.

The CLERK. JJJ, KKK, LLL and MMM for identification.

(The documents referred to were thereupon marked "Respondent's Exhibits JJJ, KKK, LLL and MMM," for identification.)



401 Mr. GILLESPIE. Those are what years, Mr. Leming?  
The CLERK. 1923, 1924, 1925, and 1926.  
Mr. LEMING. 1923 to 1926, inclusive.

By Mr. LEMING:

Q. Will you examine the returns and state which of the returns you acted as notary on in swearing Mr. Kehoe to them? The ones you have segregated here are for what years?

A. 1924, 1925, and 1926.

Q. And does your name appear on each of those as notary public?

A. Yes; it does.

Q. Taking Mr. Kehoe's oath to the returns?

A. Yes.

Q. I will ask you to examine those three returns again, if you will, please, and state whether or not they were signed by Mr. John Kehoe in his own handwriting?

A. Yes; they were.

Mr. GILLESPIE. The answer was——

Mr. LEMING. Yes; they were.

By Mr. LEMING:

Q. I call your attention to the 1923 returns and ask you to examine that and state whether you know in whose handwriting that is, or whose handwriting in your opinion is it?

A. Mr. Kehoe's.

Q. Mr. John Kehoe's?

A. Yes.

Mr. GILLESPIE. Do you mean the signature, Mr. Leming?

Mr. LEMING. Yes. The signature is in the handwriting of John Kehoe——

By Mr. LEMING:

Q. Is that correct?

402 A. Yes.

Mr. LEMING. I offer these returns in evidence for the years 1923, 1924, 1925, and 1926, heretofore marked for identification as Respondent's Exhibits JJJ, KKK, LLL, and MMM. The purpose of the offer at this time is to form the basis of comparison for signatures, only.

Mr. GILLESPIE. Only?

Mr. LEMING. That is the offer at this time; yes, sir. If I wish to enlarge it later, I, of course——

Mr. GILLESPIE. We have no objection to the offer for that purpose at this time.

The MEMBER. They may be admitted and marked as Respondent's Exhibits.

The CLERK. JJJ, KKK, LLL, and MMM.



(The documents referred to were received in evidence, and were marked "Respondent's Exhibits JJJ, KKK, LLL, and MMM," and made a part of this record.)

By Mr. LEMING:

Q. I show you a document and ask you to examine it carefully, Mrs. Seward; and state if you know in whose handwriting it is?

Mr. GILLESPIE. That is, the signature only?

Mr. LEMING. The entire document. The question stands.

The WITNESS, John Kehoe's.

Mr. LEMING. I offer the document in evidence as a basis for comparison of the handwriting and signature of John Kehoe.

Mr. GILLESPIE. No objection to the offer for the specific purpose of comparing the handwriting or the alleged handwriting  
403 of John Kehoe.

The MEMBER. It will be received for the purpose of comparison as Respondent's Exhibit NNN.

The CLERK. Exhibit NNN.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit NNN," and made a part of this record.)

By Mr. LEMING:

Q. I show you a document and ask you, Mrs. Seward; if you will examine it carefully and state whether or not you know in whose handwriting the signature is?

A. It looks like Mr. Kehoe's.

Q. It looks like Mr. Kehoe's?

A. Yes.

Q. In your opinion is it Mr. Kehoe's handwriting?

A. Yes; it is.

(Mr. Leming hands paper to counsel for petitioner.)

Mr. LEMING. I offer the document in evidence for the purpose of showing the interest of the petitioner, John Kehoe, as the principal in the permit issued to operate Bartel's Brewery in the name of Patrick F. McGowan.

Mr. GILLESPIE. Will you read the offer, please. I was looking at something else.

(The statement referred to was read by the Reporter.)

Mr. GILLESPIE. Will you bear with us for a moment, Mr. Leming?

Mr. LEMING. Yes, sir.

Mr. GILLESPIE. May I ask the sitting Member to read this first so he will understand the nature of my argument against  
404 its admission?

(The Member reads the paper referred to.)

Mr. GILLESPIE. If your Honor please, we object to the admission of the letter or communication which is a copy of the original



offered by the Government. Your Honor has read it and you understand its nature, and that may shorten my argument against it. You will observe the attached communication, or copy of a communication which is attached, is from the office of the Prohibition Commissioner and is dated May 21, 1924. Your Honor will bear in mind, of course, that May 21, 1924, is prior to the issuance of a permit to Patrick F. McGowan, which was of the date June 18, 1924, and receipted for June 24, 1924, and that the annexed communication asked to be admitted is dated May 21, 1924, and is addressed to the Bartel Brewing Company, Incorporated, Plymouth Street, Edwardsville, Pennsylvania, and reads:

"GENTLEMEN: Reference is made to your application for permit to operate a dealcoholizing plant.

"You are advised your application has been given careful consideration and upon weighing all of the information submitted it has been concluded the application should be disapproved.

"Respectfully,

"JAMES F. JONES,

"Assistant Prohibition Commissioner."

Your Honor will observe this does not refer to the McGowan permit or application for permit. There is no connection between the McGowan permit and that asked for by the Bartel Brewing Company, Incorporated—

405 Mr. LEMING. I think we can save time by asking that this be marked for identification at the moment.

Mr. GILLESPIE. There will be no objection to that, of course.

The MEMBER. It may be marked for identification.

The CLERK. OOO for identification.

(The document referred to was thereupon marked "Respondent's Exhibit OOO" for identification.)

By Mr. LEMING:

Q. Mrs. Seward, I show you a document and ask you if you can state in whose handwriting the signature is on it?

A. That is my signature. I signed John Kehoe's name on this.

Q. John Kehoe's name is in your handwriting?

A. Yes.

Q. Did you type that letter?

A. Yes, sir; I did.

Q. Was the context of that letter dictated to you by Mr. Kehoe?

A. Yes; it was.

Q. Did you on occasion sign his name to letters dictated by him?

A. Once in a while.

Q. And when you did so it was at his request?

A. Yes. I had permission to sign them.



Mr. LEMING. This may be marked for identification?

Mr. GILLESPIE. May we look at it first?

Mr. LEMING. I will hand it to you after it is marked.

The MEMBER. It may be marked.

The CLERK. PPP for identification.

406 (The document referred to was thereupon marked "Respondent's Exhibit PPP," for identification.)

Mr. GILLESPIE. I will reserve my objection until later.

By Mr. LEMING:

Q. I show you another document, Mrs. Seward, and ask you to examine it carefully and state if you know in whose handwriting the signature is?

A. John Kehoe's.

Q. John Kehoe's?

A. Yes.

Mr. LEMING. This may be marked for identification, please?

The MEMBER. It may be marked for identification.

The CLERK. QQQ.

(The document referred to was thereupon marked "Respondent's Exhibit QQQ," for identification.)

By Mr. LEMING:

Q. Referring to Exhibit QQQ, the document you have just testified concerning, was that letter dictated to you?

A. Yes; it was.

Q. And you typed it?

A. Yes.

Q. Did I show you this, Mr. Gillespie?

(Mr. Leming hands paper to Mr. Gillespie.)

Mr. LEMING. Now, may these three exhibits OOO, PPP, and QQQ for identification be handed to his Honor so that he may see them in connection with the further discussion?

(The Clerk hands papers to Member.)

Mr. LEMING. I now offer the three documents so marked for identification, if your Honor please, for the purpose already stated.

407 (Discussion off the record.)

Mr. GILLESPIE. If your Honor please, as to one of those exhibits, the identification of which I do not know—

Mr. WHITE. PPP.

Mr. GILLESPIE. I understand, however, it is PPP—which the Government asks to have admitted into evidence, my recollection is that the testimony of the witness upon the stand as to that letter and signature was to the effect the dictation was given by Mr. Kehoe to her and she typewrote it and that she had signed Mr. Kehoe's name to several papers, but I do not recall that she



said she signed this name for him by his direction, specifically pertaining to this letter. I may be wrong, but that is my impression at the present time, that she did not say he told her to sign this letter specifically. I do not recall that she so stated.

The MEMBER. Will the Reporter read that?

Mr. GILLESPIE. I have suggested to Mr. Leming that he might ask her and shorten it.

Mr. LEMING. I think we had better follow his Honor's suggestion.

(Whereupon the Reporter read as follows:)

"Q. Mrs. Seward, I show you a document and ask you if you can state in whose handwriting the signature is on it?

"A. That is my signature. I signed John Kehoe's name on this.

"Q. John Kehoe's name is in your handwriting?

"A. Yes.

"Q. Did you type that letter?

"A. Yes, sir, I did.

408 "Q. Was the context of that letter dictated to you by Mr. Kehoe?

"A. Yes; it was.

"Q. Did you on occasion sign his name to letters dictated by him?

"A. Once in a while.

"Q. And when you did so it was at his request?

"A. Yes. I had permission to sign them."

Mr. GILLESPIE. I submit the Government has not laid the ground for the admission of this testimony. Merely because she had several times signed his name at his request does not bind us to the admission of this exhibit in evidence.

Mr. LEMING. If my ears do not deceive me, the Reporter read just what covers it.

Mr. GILLESPIE. I do not agree.

Mr. LEMING. You forget the last thing he read.

Mr. GILLESPIE. It does not sustain the right of the Government to offer this particular document into evidence.

The MEMBER. That is the basis of your objection to Exhibit PPP?

Mr. GILLESPIE. Yes, sir.

The MEMBER. Are you objecting to any of the rest of it?

Mr. GILLESPIE. No, sir.

The MEMBER. You have nothing further on that?

Mr. GILLESPIE. Nothing, except this one point: It is so easy for the Government to sustain that fact that I suggested they might do so, not knowing whether they would succeed or  
409 not, but they did not ask the question. I do object to it.

The MEMBER. It seems to me it has been covered. The objection will be overruled and it may be admitted.



Mr. GILLESPIE. Exception.

The MEMBER. An exception will be allowed.

Mr. LEMING. You may cross-examine.

Mr. GILLESPIE. No questions of the witness.

(Witness excused.)

Whereupon BERT C. FARRAR was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Where do you live, Mr. Farrar?

A. In the City of Washington, District of Columbia.

Q. What is your occupation?

A. I am Examiner of the questioned documents for the United States Treasury.

Q. What are the duties of that position?

A. My duties consist in passing upon the genuineness of signatures, the common identity of two or more writings; questions involving the identity of two or more typewriters, the chemistry of inks, the age of inks, altered documents, and allied subjects.

Q. How much of your time is devoted to that kind of work?

410 A. All of my time. That is not always Government cases. I have considerable private practice. But all of my time is devoted to this line of work.

Q. And how long have you followed that profession?

A. For more than 30 years.

The MEMBER. How long did you say?

The WITNESS. For more than 30 years.

By Mr. LEMING:

Q. Have you ever qualified as an Examiner in any court in that respect?

A. Yes, I have qualified as an examiner in numerous income tax cases; I have qualified as an examiner in state and United States courts in some 37 states in the Union. I have qualified as an examiner in the State of Pennsylvania, in many cities, Lewiston, Pittsburgh, Philadelphia, but not in this city.

Q. In the United States District Courts?

A. Both the United States and state courts. There was a case at Mauch Chunk, a ballot fraud case where there was some little argument on a Congressional election.

Q. Mr. Farrar, I show you Government Exhibits MMM, LLL, KKK, JJJ, and NNN and I will ask you if you have heretofore examined those documents?

A. I have.



Mr. LEMING. Will the Clerk mark this for identification, please?

The CLERK. A check dated May 7, 1926, is being marked for identification.

Mr. LEMING. Be careful where you mark it. Take a clean space.

The CLERK. Exhibit RRR.

(The document referred to was thereupon marked  
411 "Respondent's Exhibit RRR." for identification.)

By Mr. LEMING:

Q. I show you a document, Mr. Farrar, that has been marked for identification as "Respondent's Exhibit RRR": I will ask you to look at it and state whether or not you have previously examined it?

A. Yes. I have examined the face and back of this document which you have just handed me, and especially—

Q. Perhaps that is sufficient for the moment.

A. Yes.

Q. May I ask you if you have previously made a study of the writing on the reverse side of this document identified as Respondent's Exhibit RRR and also the writing on Respondent's Exhibit NNN and also the signatures of John Kehoe on Respondent's Exhibits JJJ, LLL, MMM, and KKK?

A. I have.

Mr. WHITE. May we see that check?

(Mr. Leming hands check to counsel for petitioner.)

Mr. LEMING. I might say I want to make an acknowledgment to counsel that I did not inquire whether you wanted to cross examine the witness on his qualifications.

Mr. GILLESPIE. No, sir.

Mr. LEMING. Thank you.

Mr. GILLESPIE. May we see Exhibit LLL, Mr. Leming?

(Mr. Leming hands check to counsel for petitioner.)

By Mr. LEMING:

Q. After having compared the writing to which your attention has just been called, have you formed an opinion as to whether or not the writing is all by the same person?

412 A. I have.

Q. What is your opinion?

A. It is my opinion that all of this writing is in the hand of the same person; that is, if the standard writing is in the hand of John Kehoe, then in my opinion John Kehoe endorsed draft 24650, that is, the name of W. J. Vincent on the back of that draft which is marked—

Q. RRR?



A. RRR—

Q. As I understand you, Mr. Farrar, you say if the standards you have are in the handwriting of John Kehoe, then John Kehoe wrote the endorsement of W. J. Vincent on the back of this draft marked for identification RRR?

A. That is correct.

Q. Now, what do you mean by the standard?

A. The standard writings are the signatures of John Kehoe on the income tax return for 1923, 1924, and 1925, I believe, and the letter signed "John Kehoe" addressed to the Honorable John J. Casey, marked Exhibit NNN.

Q. Those are the writings you refer to as the standard?

A. Those are the standard writings, yes.

Q. Now, in describing the standards, Mr. Farrar, will you check the exhibits there?

A. KKK, LLL, MMM, and NNN, I believe.

Q. Now, you have JJJ?

A. Yes.

Q. And KKK?

A. Correct.

Q. LLL?

A. Yes, sir.

Q. That was one of them?

A. That is correct.

413 Q. Then there is MMM?

A. MMM.

Q. And the next is NNN?

A. Yes, sir.

Q. Those are the standards?

A. Those are the standards; yes.

Q. Now, Mr. Farrar, will you explain to his Honor how you arrive at your opinion and the reasons upon which you base your conclusions?

A. The method employed in this case was to first study the standard writings in order to form a knowledge of what the writer could do or might do, whether certain habits were habits that carried out regularly, or were intermittent habits. In this particular case I had merely signatures at first to examine, and which I did not consider sufficient.

The name John Kehoe is very short, and I asked for more standards, and later secured for examination the exhibit NNN.

After examining the standard writing I made an examination of the endorsement of Vincent on the back of the draft. Then brought them together and, after making this comparison, I found that the two writings in my opinion checked.

In order to give the reasons upon which I base my opinion I would like to hand the standard writing and the questioned writ-



ing to the Court so that he can follow what I have to say about the signature. I have had no opportunity to present any prepared comparison charts, so I have no copy available either for myself or for the other side. This examination was all made in Scranton.

I have marked that letter, Exhibit NNN, with numbers in pencil. I have numbered in pencil the words on the left-hand side and the number of the lines on that letter so I can  
414 refer to certain words on the letter for comparison.

As to the ability of the writer, I notice that the quality of the writing as compared with the 1919 writing, the quality of the writing, strange to say, has slightly improved. I had heard in Court that Mr. Kehoe had been suffering from 1924 with rheumatism and, strange to say, the writing is slightly better between 1919 and the later dates from 1924 on. The endorsement on the draft agrees a little better with the facilities of the writing of the later dates.

Now, my identification of the two writings, I have grouped as we always do first the ability of the writer, which is not of a high order, then the quality of the writing. The pen strokes are fairly plain in both writings. I am speaking now about the writing on the questioned endorsement and the standard writings.

The pen position is the same in both. The pen is held practically at right angles to the writing-line. That is indicated by the position of the shading. If the pen were held pointing off to the right, the shading would be—or the pen were held in this position, say [indicating], parallel to the writing line, the shading would be lower.

At right angles to the paper the shading follows from top to bottom with both nibs of the pen striking the paper.

In both respects these writings agree; as a matter of fact the shading in both writings are down strokes almost invariably, and this shading begins high up on the top of the stroke. For instance, in Mr. Kehoe's signature the shading of this "J" begins high up. The "N," the shading begins high, and, as I say, this shading on that pressure is on a downstroke. The writing speed,

as I just mentioned, more nearly agree with the 1924 and  
415 from then on writing than it does with the letter of 1919, NNN.

Now, the ability of the writer to follow an imaginary writing line, the alignment is not very good in NNN and neither is it very good on the questioned endorsement, that ability to follow the line.

The size of the writing is about the same in all of the writings, that is an average. When I say the same, that does not mean an absolute measurement.



The letter connections are rather identifying, and in fact very identifying in the signature of Mr. Kehoe, and in his writing on NNN, and in the endorsement, the questioned endorsement of Vincent on the draft. The length of these letter connections are abnormal sometimes, and sometimes too short. This is consistent throughout all of the writings, for instance, the length of the letter connections between "e" and "n," say.

As to punctuations, there is not very much of them, but it is the habit of Mr. Kehoe, as I look through these various writings, to place a period below the line. That is true on the Vincent endorsement. There is another identification, a partial identification of punctuation, and that is on the Vincent endorsement there is a long comma which stands for a dot over the "i." This is only a partial identification because in Exhibit NNN where Mr. Kehoe dots an "i," he makes a horizontal stroke to the right. In a great many instances the Court will find a number of those in the lower right on Exhibit NNN, but they are usually long thick commas.

There is another thing, the particularity in slant, common to both writings. In other words, his writing has no common slant.

The standard writing has no common slant, and the one letter swings off to the right, one is perpendicular and one to the left. That is also common to the questioned endorsement on the draft.

Now, coming lastly to the matter of design which the layman, of course, looks for, and which the expert looks for last, there are a great many similarities in design between the two writings, and I will call attention to a few of the words in Exhibit NNN, as compared with the questioned endorsement of Vincent on the back of the draft.

For instance, in the capital "J," the capital "J" on the standard writing is formed by a swing from right to left, and generally a very narrow top, often pointed, and as I said before, the shading begins at the top of the letter and continues on down, becoming slightly thinner towards the bottom. The lower loop is slightly narrow. This "J" may be compared with the "J" on line 3 of NNN, as compared with the "J" on the questioned endorsement.

The "V" in Vincent is very short for a capital. There are no V's, capital V's, in the standard writing, but there are some small v's, and these small v's are similar to the questioned endorsement in that they have no turned loop. That may be seen on line 5 of the letter, the word "have," and line 9, the word "never."

In other words, after the "V" is completed it drags downward without any terminal loop.

It is a frequent habit of the standard writings to make the letter "I" more vertical than others, as on line 15, the word



"entitle." That is not a consistent habit, but it is quite a frequent habit.

The letter "N," the small "n" is generally made with the first half of the letter rather angular, and the second half of the letter more round at the top and dragging into the right, that is  
417 comparing the small "n" in the word "Vincent" with the small "n" in "Pittston," line 3, and in "John" on line 5.

The letter "C," wherever found in either the standard or questioned writings has a very round top, is heavy capped; in other words, the initial stroke goes around in a semi-circle, with a small return hook before completing the last swing of the hand. That hook "C" appears not in only the questioned endorsement, but appears in nearly every instance, and in fact in every instance in the standard writings, such as "justice" in line 7, and "judge" in line 8, and the word "second" and "received" on line 14.

Coming to the small "e," which follows the "c" in the word "Vincent," this "e" has a narrow loop, and it is a well known principle that the previous stroke has an influence on the next stroke, and in this instance the writer is inclined to pinch the "e" above the writing line in making this narrow letter.

It is the habit of numerous writers, it is of course, not done often, but still it is common to these writings, and that "e" in "Vincent" is slightly above the writing line, and it can be compared with "e" in "Casey" on line 4. The last "n" in the word "Vincent" has been described, and we now come to the final "t." The "t" is in such a way that I did not clear up doubt that I had in my mind that the writing was rather peculiar. I was looking for a left-handed writer, and sometimes you can tell that, and sometimes you can not. I was a little puzzled. The left-handed writer generally crosses his "t" from right to left, and shades his stroke towards the palm of the hand. Nothing of this kind was there, and so I had to let it go at that.

418 Now, the cross on this "t" that I have mentioned is from left to right, and they are not very long, and tend to begin at the staff of the "t" and swing upward to the right.

There is another peculiarity about this "t" wherever found in the standard writings of the "Vincent," and that is the tented form. There is no loop to the "t," and if the Court will please compare the "t" in "Vincent" with the "t" in "that" on line 12, "it" and "get" on line 17, and "get" on line 19, and "let" on line 18, you will have the tented form of the "t" and the "t" crossing, you will find it tending to swing upwards as in the word "Vincent."

Those are a few of the marks of identification I found which would make me believe they were both written by the same per-



son. That is not all, but those are the highlights of my examination.

Q. Mr. Farrar, did I understand that you resolved satisfactorily in your own mind finally the question that was occurring about the "u"?

A. Well, as to a left-handed or right-handed writer, as I said, it can not always be determined, because the left-handed writer does the best he can. His writing should go from the right hand side of the line towards the left. Unfortunately it does not, and he adapts himself the best he can, and he often swings his hand around three-quarters of the circle, and moves his paper around in order to adapt his left hand to the writing. But the man who places a piece of paper at right angles to his body, which holds the pen pointing downward to the lower right, why, then you could find the shading towards the person. In other words, the capital "J," the upstroke would be shaded, which is abnormal of the right-handed writer. I had to discard that. You  
419 can not always tell. You can not always tell a woman's writing, but seven times out of ten you may be able to identify a woman's writing.

Mr. LEMING. Take the witness.

Cross examination by Mr. O'HARA:

Q. Mr. Farrar, will you say that the signature on that check was a free writing without any attempt to conceal the identity of the person who was signing?

A. I consider it freely written; yes. It has none of the accompanying acts which a copied signature would have.

Q. And naturally this writing in the standard writing which you denominate as standard writings would be without any attempt to disguise them because they were his signatures to certain documents?

A. No reason.

Q. I believe you said that the first papers submitted to you were these income tax returns?

A. Yes.

Q. For the years 1924, 1925, and 1926?

A. Yes, sir.

Q. And you said also you had difficulty in arriving at your conclusion until there was likewise turned over to you this letter, which is marked Respondent's Exhibit NNN?

A. I felt that writing was too narrow to scale.

Q. By that you mean what?

A. Not enough writing.

Q. Only the signature.

A. Yes, sir.



Q. You of course knew or you noted rather that this  
420 letter was written in 1919, and it appears that the endorsement on this check was made in May, 1926?

A. Yes; I commented on that.

Q. A lapse of seven years?

A. And a slight improvement in the writing.

Q. Would you say that a person who was afflicted with a rheumatic condition, which would subject him to periodically very severe attacks where he might be bedridden for weeks and months, and where his hands might be swollen and crippled, would you say that it was unusual that the quality of his handwriting should improve?

A. Yes; I was surprised because I noticed Mr. Kehoe, and he stated that he had been suffering from rheumatism, and it is rather odd that his writing after 1924, or from 1924 showed slightly more fluent than the writing of 1919, although it is not necessary to write with the fingers. The hand may be held perfectly rigid, and perform good writing, in other words, on the muscles of the arm. It does not require finger movement. This writing is with the fingers.

Q. This writing is with the fingers; I was about to ask you that?

A. Yes, sir.

Q. You heard Mr. Kehoe testify on the stand, and you observed him on the stand?

A. Yes; I was in court.

Q. And giving full credit to his testimony, and your observation of him, did you take that into consideration; in other words this rheumatic condition and the condition of his hands, when you arrived at your opinion as to the identity of this handwriting?

A. Yes, I examined the signatures of 1924, at least they began in 1924, 1925, 1926, 1927, and 1931.

421 Q. Which is not in evidence?

A. No; and those signatures when examined show that this "Kehoe" could have very readily been written as well as he did on the back of that draft. There is no reason why he should not, as compared with those signatures.

Mr. LEMING. I would like to say that Mr. Farrar examined this return for 1930. I had expected to have it placed in evidence. I am quite agreeable to its going in, and to form a part of the standards.

Mr. O'HARA. We have no objection, if you wish to put it in.

The WITNESS. I did not ask for it, as there was no question involved for 1931.

Mr. O'HARA. Since it has been mentioned in the testimony, if counsel wants to put it in, that will be agreeable to us.



Mr. LEMING. I would like for it to be in so that the witness can have it as part of the standard.

The MEMBER. It will be marked "SSS" for that purpose.

(The document referred to was received in evidence and marked "Respondent's Exhibit SSS," and made a part of this record.)

By Mr. O'HARA:

Q. Mr. Farrar, would the standards that you used in comparing the handwriting with the standard handwriting vary upon a knowledge on your part of the fact that the standard handwriting was by a man who was subjected to this affliction, and whose condition might vary from time to time, and from year to year, and even from month to month, would the standards that you used be varied in any respect?

422 A. I should say so; yes.

Q. In what respect?

A. I should say in this respect, I would alter my opinion if it could be shown positively that Mr. Kehoe was suffering so from rheumatism at the time of the cashing of that draft that he was absolutely unable to write. That is, absolute evidence to that effect. No one can contradict that, for handwriting testimony is not positive testimony.

Q. It is purely opinion?

A. It is more than opinion testimony, it is demonstrative testimony. Your opinion alone would be worthless, unless you show your reason that would be given by distinct and exact signs.

Q. Even though there had not been a showing he was totally incapable of writing at that time, suppose there had been a showing at this particular time that he was convalescing from an attack, or he was in an attack, so that his ability to write was very questionable, would that fact make a difference?

A. There is nothing in the handwriting over a period of years to show that, which shows any temporary inability of that kind, and in the absence of showing of inability in the handwriting, I can only say that my opinion is not changed at all.

Q. When did you come to Scranton?

A. I got here about 12:30 Monday morning.

Q. Did you see these documents before coming to Scranton or afterwards?

A. No; I had not seen them at all until then.

Q. You examined them on Monday?

A. I examined them during this week; yes.

Q. And you examined also the documents where the signatures appear?

A. Yes; off and on during the week.



423 Q. And you naturally examined this document designated as Respondent's Exhibit NNN?

A. Quite carefully.

Q. On which you base your opinion on a study of these documents during this week. Had you formed an opinion before you saw Mr. Kehoe on the stand and observed him?

A. Yes; my opinion was given before then.

Q. And the knowledge which came to you when you saw him on the stand and observed the conditions of his hand, from that your opinion was not modified in any respect?

A. No, sir.

Q. Did you feel it necessary to revise the opinion you had already formed?

A. No, sir.

Q. So when you reached the opinion that you gave on the stand you knew nothing of this rheumatic condition you now know about?

A. Except what I said in my testimony about the peculiar condition of the writing, it made me wonder whether it might not be of a left-handed writer. There was something peculiar about the writing. I could not quite grasp it, and, of course, the rheumatic condition did explain that in a measure, except the fact that the writing slightly improved during the years rather than getting worse where this rheumatic condition was there.

Q. I was about to ask you that, and ask you if the improvement of the writing, with the rheumatic condition occurring with greater frequency in 1926 than in 1919, in your opinion, isn't that a very strange condition?

A. It may be strange, but, strange to say, the 1926 writing agrees with the first questioned endorsement on the draft  
424 even better than the 1919 writing. You can jump over that hurdle if you can. I cannot.

Q. Didn't you say, or didn't you mean, Mr. Farrar, the 1919 writing is in closer agreement with the endorsement on the draft than the 1926?

A. No; you do not get me at all. This draft is dated 1926, the Vincent draft. The signature of Mr. Kehoe executed in 1926 agreed more closely with his writing ability on this draft than does the writing of 1919. There you are.

Q. And still, Mr. Farrar, you do admit that, based on this signature here fixed on March 13, 1926, and these other signatures which were contemporaneous—they were not sufficient on which to base your opinion, and it was not until you saw this letter, and observed certain characteristics found in this letter, that you arrived at the opinion you now have?

A. Well, I possibly will modify my statement a little bit in this way—while I was satisfied that the two writings were the



same, there is a big difference in satisfying yourself and satisfying a court or a jury, and, as I say, an opinion alone is a mighty poor thing, if it stands alone, and I would like to give some reasons to a court or jury as to why I think so, and I asked for more writing. That was one of the reasons for getting more writing. When I secured that writing I found it did check in every respect far beyond the possibility of a mere coincidence.

Q. In testifying with respect to certain characteristics on the standard writings and comparing them with the writing in question, you said that the alignment in the standard writings and the questioned writing were about the same. To my unpracticed eye I cannot agree with you. The document I am using for comparison is the return for 1925, signed March 13, 1926, 425 as compared with the questioned writing. Will you say, generally speaking, that the alignment in the signature here and the questioned writing is the same?

A. I think it agrees very well in regularity, for instance, "incent" in "Vincent" is slightly above the bottom of the capital V, and that is generally true of Mr. Kehoe's signature there. The "ehoe" is slightly above the base of the K. I did not mention that. There are so many of these that you could mention, but the "o" in John, in this particular signature executed in 1926, is far above the writing line as is the "e" in Vincent. In other words, a certain regularity as regards signatures on the fixed writing line, and that irregularity in slant there is common to both.

Q. Of course, it is true that very many people, perhaps thousands of people, have irregularities in alignment of letters, and also slant?

A. One feature common to both writings is absolutely significant.

Q. You did not answer my question?

A. I am answering. It is significant. It would not mean a thing unless this incident was ordinarily rare. This is not a rare incident, but when apparent in combination with a hundred others, it is.

Q. Suppose, Mr. Farrar, you had not been furnished with this letter of 1919, and you had been compelled to use as a standard the writings made at the same time, represented by the signatures on these returns, in that instance would you have unhesitatingly and unqualifiedly given it as your opinion that the writings on those returns and on this check were written by the same person?

A. I would not have appeared on the stand.

Q. You would not have appeared on the stand if you had 426 not been furnished with that piece of paper to modify your opinion?



A. No.

Q. Notwithstanding your opinion, Mr. Farrar, you do in this case, at least with your knowledge of conditions, admit the possibility of error in your opinion?

A. As I said before, the possibility of error is extremely remote.

Q. That is your opinion.

A. Mathematically speaking it is, in my opinion very remote.

Q. I presume, however, that on other occasions when you have used the same methods, you have found yourself to have been mistaken, haven't you?

A. I have never been proven wrong in any testimony given on the stand, fortunately, not patting myself on the back.

Q. I am not speaking of testimony on the stand. I am speaking of an opinion you may have reached after some investigation, and in testifying, do you mean to say that no judicial tribunal where the matter was being adjudicated has ever held otherwise?

A. In no testimony that I have given has it ever been controverted that I was wrong. Juries have found the other way, that is perfectly correct.

Q. In other words, the adjudication of the court has been inconsistent with your testimony?

A. Because there were other circumstances. My testimony might have been incidental to the case. It had nothing to do with it. But I have never had a case where the handwriting was directly involved and I was proven wrong, so I did not know whether I was wrong or right in every instance. I am just lucky, I suppose.

Q. Proven by whom, Mr. Farrar, would you say?

427 A. By certain uncontroverted testimony. If I had said that a certain man did it, and they found out that the man was dead at the time, I certainly would have acknowledged myself as mistaken.

Q. But you do admit, however, you have testified in proceeding with respect to handwriting, and you have identified certain persons of questioned writing, and the ultimate finding has been otherwise?

A. Yes, sir.

Q. And you have found yourself opposed many times by other experts whose opinions were different from yours?

A. Not in cases where the issue was plain such as this. It is only where it was a border-line case, and there was an honest difference of opinion on both sides, and sometimes unpleasant witnesses on the other side.

Q. Do you venture the opinion that we could not find a reputable handwriting expert to support our position that this handwriting is not the same, honestly in all fairness?



A. I don't think so under that evidence. I don't think you could find one.

Q. Do you think your testimony with respect to handwriting is infallible?

A. It is merely like a carpenter learning a job. I have had 40-odd years' experience in it, and I have devoted my time to it, and I believe I know something about it, about my trade. It is a job.

Q. Do you think it is exactly the same job as a job of carpenter?

A. Yes; I think a man learns the job, and if he learns it, he should take pride in it, and if it was not so, he says so. If I am not sure, I just say I do not know. It is a Scotch verdict. I always give the other man the benefit of the doubt.

428 Q. You will admit, however, it is not an exact science?

A. That is admitted.

Q. And there is a difference in opinion of experts in many cases?

A. Yes.

Q. And your opinion should not be taken as infallible in this or in any other case?

A. I do not think so. I do not claim that.

Q. And there is always the possibility that your conclusion might be wrong, isn't there?

A. Possible, but not probable.

Mr. O'HARA. That is all.

Mr. LEMING. No further questions.

(Witness excused.)

The MEMBER. By reason of an unforeseen circumstances happening this hearing will be adjourned at this time until 10:00 o'clock tomorrow morning.

(Thereupon at 3:45 p. m., an adjournment in the above entitled matter was taken until 10:00 o'clock a. m., Friday, August 24, 1934.)

Hearing at Scranton, Pennsylvania, on the 24th day of August, 1934, at 10:00 o'clock a. m.

W. P. KRAUSE was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mr. Krause, where do you live?

A. 1408 Mulberry Street.

429 Q. Scranton, Pennsylvania?

A. Yes, sir.

Q. How long have you lived in Scranton?

A. Thirty-two years.



Q. What was the nature of your employment in the year 1923, Mr. Krause?

A. I was salesman for Marty Fanning of the Fanning Motor Car Company.

Q. And where did you go from there?

A. Mr. Fanning sold Mr. Loughran a Lincoln sedan and asked me to deliver it; and I delivered it to Mr. Loughran, and the day I delivered the car to Mr. Loughran, he asked me to drive for him, and I started to work for Mr. Loughran about the beginning of 1924.

Q. That was W. V. Loughran?

A. William V. Loughran.

Q. What was the nature of your work with Mr. Loughran?

A. Chauffeur.

Q. And as a chauffeur for Mr. Loughran will you explain just what your duties were?

A. Driving Mr. Loughran down to the Elks Club.

Q. And anywhere else he wanted to go?

A. And anywhere else; yes.

Q. Did you ever have occasion to drive him to Pittston, Pennsylvania?

A. Yes, sir.

Q. Where did you take him there?

A. To the corner of William Street and Main Street, Pittston.

Q. Did you take him there often?

A. Once or twice a week.

Q. Does that hold true for the year 1925 as long as you were with him in the year 1925?

A. Yes, 1925.

430 Q. Did you on any occasion pick up any other person there and drive him along with Mr. Loughran in the car?

A. I think one time I picked up a man and drove him about two blocks to a bank.

Q. What bank?

A. I don't know the name of the bank.

Q. What was the name of that man?

A. I think Mr. Kehoe.

Q. John Kehoe?

A. I think so.

Q. The gentleman sitting at the end of the table?

A. Yes, sir.

Q. Did you mail Mr. Loughran's letters for him?

A. Yes, sir; I did.

Q. Where were they addressed to generally, some of them?

A. Mr. Kehoe, 127 William Street, Pittston.

Q. Was that the same address to which you would drive Mr. Loughran?



A. I think so.

Q. Whether it is 127 or some other number, are you sure about the number of that street or not?

A. That is the number the letters were mailed to.

Q. When you got to the bank did one or both of those gentlemen get out of the car?

A. Both.

Q. Did one or both of them go into the bank?

A. That I don't know.

Q. Now, as I understand your testimony, throughout your employment there, you would drive Mr. Loughran to that address about two times a week?

A. Two or three times a week; yes.

Q. Where would you pick up Mr. Loughran in the city here?

431 A. At his home.

Q. In Scranton?

A. Yes, sir.

Q. Where did you pick up Mr. Kehoe the day he rode in the car?

A. On William Street.

Q. At the address where you had mailed the letters from Mr. Loughran?

A. At the corner of William Street and Main Street.

Q. When did you leave Mr. Loughran's employ, Mr. Krause?

A. The spring of 1925.

Q. Do you remember about the month, Mr. Krause?

A. No, I do not.

Q. To refresh your recollection, Mr. Krause, I wonder if it was not in the latter part of 1925 you left Mr. Loughran's employ?

A. It may have been.

Q. Can you fix the date a little better by the time Lester Lord was hired by Mr. Loughran?

A. Mr. Lord was hired by Mr. Loughran after I left his employ, I heard. At the time I left Mr. Loughran, Mr. Lord was a cigar clerk in the Elks Club. Some time after that I heard he was employed by Mr. Loughran.

Q. Do you have any way you could refresh your recollection as to fixing the date of your employment a little closer—by that I mean any incident in mind, or anything that occurred or anything else, to aid your memory in fixing the time when you quit his employ?

A. No; I do not.

Mr. LEMING. You may take the witness.

Mr. GILLESPIE. No cross examination.

432 The MEMBER. You may be excused.

(Witness excused.)



Thereupon, LESTER LORD was called as a witness by and on behalf of the respondent and, having first been duly sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. State your name.

A. Lester Lord.

Q. How old are you, Lester?

A. Twenty-eight.

Q. At the present time?

A. Yes, sir.

Q. Where were you working in 1923?

A. I was working with John Golden.

Q. In Scranton?

A. In Scranton, on Wyoming Avenue, selling religious articles.

Q. What were you doing in 1924?

A. Well, I stayed with the religious store until I went to with Mr. Loughran.

Q. Just what do you mean by religious store, were they publishers?

A. No; selling prayer books and religious works and pictures.

Q. In other words, the articles like you see in the store windows; merchandise?

A. Yes, sir.

Q. It was not papers or things of that kind?

A. No, books and pictures.

Q. You were a clerk in the store?

A. No, selling on the road and collecting.

433 Q. Were you travelling on the road?

A. Yes, sir.

Q. You would carry your supplies with you?

A. Yes, sir.

Q. What were you doing in 1924; when did you work at the Elks Club?

A. I worked there about five and one-half years.

Q. Do you know W. V. Loughran?

A. Yes, sir.

Q. Do you recall about when you went to work for him, or did you go to work for him?

A. I think the latter part of 1924 or 1925.

Q. Do you think it would be 1925?

A. I think it would be 1925.

Q. Where had you been working immediately before that?

A. With this religious concern.

Q. Did you work for the Elks Club at that time, or at any time?

A. I worked at the Elks Club during the World War.



Q. To refresh your recollection, weren't you cigar clerk at the Elks Club when Mr. Loughran hired you?

A. No; I was with the religious store.

Q. When Mr. Loughran hired you?

A. Yes, sir.

Q. And before that you had worked at the Elks Club?

A. I had worked at the Elks Club.

Q. Had you seen Mr. Loughran around the Elks Club?

A. Yes, sir.

Q. What was the nature of your work with Mr. Loughran?

A. I was bookkeeper and messenger.

434 Q. Would you go out of Scranton to any other places as messenger for Mr. Loughran?

A. Yes, sir.

Q. What would you carry with you?

A. Well, whatever he might give me, envelopes or papers.

Q. Do you know what was in the envelopes?

A. Well, sometimes there would be money in the envelopes, other times there would be just papers in the envelope.

Q. Do you know to what addresses you would take those papers or money, or whatever there was in the envelope?

A. Well, I would take them down to the Liberty National Bank Building. I think it was, in Pittston to the Kehoe Real Estate Office.

Q. To the Kehoe Real Estate Office?

A. Yes, sir.

Q. How soon after you entered Mr. Loughran's employ did you begin to make those trips to Pittston; was it shortly after?

A. No; it was quite a while afterwards.

Q. Do you remember when Mr. Loughran went to the hospital at Mayo Brothers?

A. I don't recollect just the time.

Q. You remember he did go, however?

A. Yes, sir.

Q. Had you been down to Pittston as messenger before he went away on that trip to the hospital?

A. I couldn't say.

Q. Were you with him while he was in the hospital?

A. Yes, sir.

Q. Who handed you the envelopes to take to Pittston?

A. Mr. Loughran.

435 Q. When he was in the hospital he was in Rochester, Minnesota?

A. Yes, sir.

Q. So he must have handed you some envelopes before he went to the hospital?

A. Yes, sir.



Q. Did you begin to do messenger service for him immediately after your employ by Mr. Loughran?

A. Well, there was a little while I was in the office before I carried any papers.

Q. What were your duties in the office?

A. Just to keep track of anything that came in, answer the telephone, and take messages.

Q. Where was that office located in Scranton?

A. In the Miller building.

Mr. LEMING. Take the witness.

Cross-examination by Mr. GILLESPIE:

Q. Mr. Lord, you spoke of going to the Liberty Bank Building in Pittston with a package or letters or messages. Did you ever deliver any of them to Mr. John Kehoe sitting at this table?

A. No, sir.

Mr. GILLESPIE. That is all.

Redirect examination by Mr. LEMING:

Q. Did you go into the office, Mr. Lord, where you delivered those?

A. Yes, sir.

Q. How many persons did you usually see in that office?

A. One.

436 Q. Was anybody else in the office, whether you knew them or not?

A. No, sir.

Q. You never did see anybody else in the office?

A. No, sir.

Q. Except the person to whom you handed the envelope?

A. Yes, sir.

Q. Who did you say that was?

A. The first time I went down there I was to see Mr. McHugh, and Mr. McHugh was not there, and the man that was there was Tom Kehoe, and I told him I wanted to see Mr. McHugh, and he said, "Mr. McHugh is not here. I am in charge." And he said, "Did Mr. Loughran send you down?" and I said yes, and he said, "You can give me the package and I will see that Mr. McHugh gets it."

Q. Who were you talking to there?

A. Mr. Tom Kehoe.

Q. You went into that place because you understood that is where you would find Mr. McHugh?

A. Yes, sir.

Mr. LEMING. That is all.

Mr. GILLESPIE. That is all.

The MEMBER. You may be excused.

(Witness excused.)



Thereupon W. G. KEATING was recalled as a witness for the respondent, having been heretofore duly sworn, was further examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mr. Keating, you have been on the witness stand previously?

A. Yes, sir.

437 Q. And you testified you had come in response to a subpoena addressed to the American Surety Company?

A. Yes, sir.

Q. A subpoena to produce certain papers?

A. Yes, sir.

Q. And the examination was interrupted at the time due to your indisposition, due to trouble with your tooth, while you were on the witness stand?

A. Yes, sir.

Mr. LEMING. I mention that so the record will show why we have not proceeded along with him.

Mr. GILLESPIE. That is correct.

By Mr. LEMING:

Q. Now, Mr. Keating, will you turn to your subpoena and to Item 4, page 2 of the matters to bring with you.

A. I have it; yes, sir; in my subpoena.

Q. Item 4 of the subpoena, in response to that you produced the document now marked in evidence "Respondent's Exhibit VV," is that right?

A. That is correct.

Q. Now, the subpoena called for certain items described as Item 5. Do you have that item on page 2 of the subpoena?

A. No, sir. That is a memorandum dated February 15, 1924. The file has been destroyed.

Q. It was a memorandum made in the ordinary course of business?

A. Yes, sir; an inter-company communication.

Q. Part of the private records of the company?

A. Yes, sir.

Q. You say that has been destroyed?

A. That file has been destroyed; yes.

438 Q. Look at Item No. 6 on page 3 of the matters to bring with you. Do you have that item?

A. No, sir; that file must be destroyed, too. [After investigation.] Yes; that file has been destroyed. I have here a memorandum.

Q. Just a moment; you say that item has been destroyed?

A. Yes.

Q. And you started to show me something. May I see it?

A. I have here a memorandum.



Q. Just let me see it. [Paper handed to counsel.] May I examine this?

A. Yes, sir.

Q. What is this memorandum you have shown me?

A. This card is a form used when we've called for a file that is quite ancient. It goes to the department known as "Filing and Registration Division." We shown on there the file that we want, and that department will either send the file to us, or advise us, and you will note on here in pencil the word "destroyed."

Q. What date?

A. 6-2-32.

Q. June 2, 1932?

A. Yes, sir.

Q. That is when that file was destroyed?

A. When it was destroyed in New York; yes.

Q. And when you say that file, what file are you referring to?

A. I am referring to the file called for in Item 6, under the subpoena, duces tecum, to wit: bond number 82769B Patrick F. McGowan, alcohol permit bond, in the sum of \$10,000.

Q. Are there other items in that same item 6; there are; aren't there?

439 A. Well, you called for the entire file.

Q. Yes; but the subpoena calls for specific matters?

A. Item 6 of the subpoena reads "Your entire file in re matters referred to in memorandum reading as follows:"

Q. You are right; I beg your pardon. That called for the entire file in respect of that bond. And all of the file has been destroyed except the indemnity agreement which you produced?

A. I am not sure that indemnity agreement refers to that particular file. [After examination.] Yes, that is correct.

Q. And indemnity agreements, what is the practice as to the destruction of them?

A. They are never destroyed.

Q. Now, your Item 7, on the subpoena, did you bring those matters with you?

A. I have them here.

Q. All right, will you hand me the certificate of deposit No. 696?

A. The subpoena does not call for it.

Q. Read your subpoena, Item 7.

A. "Your entire file in re bond number 334098B, Patrick F. McGowan, \$25,000, including collateral."

Q. What are those last words?

A. You are correct; yes.

Q. Will you hand me that?



A. I will get that for you. Mr. Lucas just called my attention to that. "I will have it come up from the office. I would like to have a subpoena calling for that specifically, for that certificate of deposit, if you have no objection."

Q. So that you will understand I asked for this subpoena this morning. The witness was under the impression the subpoena did not call for the collateral, so we have specifically described it, and I am glad to hand you the subpoena.

As I understand you have already agreed to produce the collateral?

A. Yes, sir. If the Court please, the collateral is very valuable, and I hate to take it out of the vault.

Q. Now, in respect of a bond supported by collateral, is it the practice of the American Surety Company to take an indemnity agreement also similar to this one in evidence, Respondent's Exhibit VV?

A. No; I would not say it was customary where we have the collateral.

Q. If you have the collateral, it takes the place of an indemnity agreement?

A. Yes, sir.

Q. And if you do not have the collateral, then you have to have an indemnity agreement?

A. Yes, sir.

Q. Well, does the American Surety Company make a bond without any collateral or without any security or assurance that they will be protected?

A. The indemnity agreement that you have there is what is called a third party indemnity agreement.

Mr. LEMING. Just a moment; strike the statement.

Mr. WHITE. I think the witness should be permitted to explain.

Mr. LEMING. The document speaks for itself. The answer is not responsive. I asked him under what circumstances indemnity agreements are taken, and whether or not they are taken when collateral is taken, and the statement volunteered by him is not responsive, and I move that it be stricken.

The MEMBER. I do not think that you gave him a chance to complete his statement. If he finishes his statement and it is not responsive, I will rule. Read the question and the answer.

(Thereupon the reporter read the pending question and answer as follows:

Q. Well, does the American Surety Company make a bond without any collateral or without any security or assurance that they will be protected?

A. The indemnity agreement that you have there is what is called a third party indemnity agreement.")

The WITNESS. I think I can overcome the objection.



Mr. LEMING. Just a moment. I asked him nothing about that Exhibit VV. He refers to the exhibit to answer something. The answer is not responsive.

The MEMBER. It does not seem to me it is exactly. I think I will rule to strike that, and in the light of this discussion I think that Mr. Keating can proceed with his answer.

The WITNESS. A bond may be written without indemnity, solely on the security of the principal in the bond.

By Mr. LEMING:

Q. That is what I wanted to know, but where you have collateral you do not require an indemnity agreement?

A. No, sir; not customarily. It could be—

Q. Just a moment, please.

442 Mr. WHITE. Just a moment. He is responding to the question.

The MEMBER. That is a response to the question. Let it stand.

By Mr. LEMING:

Q. Well, in any event an indemnity agreement is in lieu of collateral, is that right?

A. Yes; that is correct.

Q. Mr. Keating, going to Item 3 of the subpoena referring to bond 712212B, William F. McHugh, 712213B, Patrick F. McGowan, 71223B Carl Bossart, do you have the files on those bonds?

A. Yes, sir; I have those files.

Q. May I see those files, Mr. Keating?

(Papers produced and handed to counsel.)

Q. Will you take these files, Mr. Keating, the one entitled 712212B, entitled William F. McHugh, and state what that shows as to the date of the bond? Do you want to see these, Mr. Gillespie?

Mr. WHITE. If you do not mind.

[Papers handed to counsel for petitioners.]

Q. Did you state what your records shows is the date of the bond?

A. I have not yet, but I will. June 3, 1927, is the date of the bond.

Q. And that is in the case of William F. McHugh?

A. William F. McHugh; yes.

Q. And what kind of a bond do you call that?

A. That is commonly called a bail bond. It provides for the appearance of the defendant at a specified time and specified point as shown in the bond.

Q. Now, I call your attention to the face of this file again, and will ask you if that shows the name of the attorney for the defendant.



A. Yes; the application shows the name of the attorney.

443 Q. Who is that?

A. Abram Salsburg, Wilkes-Barre, Pennsylvania.

Q. I show you a file number 712213B in the name of Patrick F. McGowan, being one of the files produced in response to the subpoena, and I will ask you to state what is the date of that bond?

A. The date of that bond is June 3, 1927.

Q. That is the same date as the other?

A. The same date as the other bond.

Q. What kind of a bond is that?

A. A similar bond to the previous bond; bail or appearance bond.

Q. What does the record there show as to the attorney for the defendant?

A. The application for the bond shows the defendant's attorney as Abram Salsburg, Wilkes-Barre, Pennsylvania.

Q. I show you the third file you have produced, bond No. 712213B, in the name of Carl Bossart. Will you state the date of that bond, please?

A. June 7, 1927.

Q. What kind of a bond is that?

A. A bail or appearance bond.

Q. What does your record show as to the defendant's attorney?

A. The application for the bond shows the defendant's attorney was Abram Salsburg, Wilkes-Barre, Pennsylvania.

Q. Taking the three files you have just testified to, will you state whether or not those bail bonds were applicable to the same judicial or court proceeding?

A. Yes, sir.

Q. And will you state the style of that proceeding and the court in which it is?

444 A. "In the District Court of the United States for the Middle Division of Pennsylvania. United States of America ex rel. Patrick F. McGowan v. John H. Glass, United States Marshal."

Mr. LEMING. I wonder if the witness might step down here and examine these papers?

The MEMBER. Any objection?

Mr. GILLESPIE. No.

(Thereupon witness examines papers at the counsel table, at the conclusion of which the following occurred.)

Q. Mr. Keating thought he might be wrong in a certain answer, and as I understand it, Mr. Keating, the answer is correct?

A. I am satisfied that the answer is correct.

Q. Now, do you have with you the collateral with respect to the \$25,000 bond?



A. Yes, sir; I have that collateral here now.

Q. I hand you a copy of that which has heretofore been furnished to the Treasury Department, and will ask you to make a careful comparison of the two. Have you made such comparison?

A. I have; yes, sir.

Q. Now, this certificate of deposit No. 696, that you have produced is what; just describe it please on the face of it.

A. A certificate of deposit drawn on the Miners Savings Bank of Pittston, Pennsylvania, showing \$25,000 has been deposited in that bank payable to the order of the American Surety Company; with interest at the rate of 3 percent per annum.

Q. And it bears the signature of whom?

A. The certificate of deposit bears the signature of W. L. Foster, President.

445 Q. Now, is that certificate up as collateral with that bond—I believe it is Exhibit PP, the bond of the American Surety Company for \$25,000?

Mr. WHITE. I think the one you are looking for, Mr. Leming, is Exhibit P.

Mr. LEMING. Yes; Exhibit P.

By Mr. LEMING:

Q. I call your attention, Mr. Keating, to Respondent's Exhibit P, being a surety bond signed by Patrick F. McGowan with the American Surety Company of New York by B. H. Thomas. I will ask you to examine that and say if that is the bond with respect to which that collateral, certificate of deposit No. 696, was deposited with the American Surety Company?

Mr. WHITE. Of course, I understand that is to mean as far as the record shows.

Mr. LEMING. That is right.

Mr. WHITE. I understood him to say before he had no personal knowledge of this matter. I understood him to say he became the manager in 1927. So, I assume he is testifying now from the record.

Mr. LEMING. Well, if you want to object to the question, that is one thing. Is there an objection pending to the question?

Mr. WHITE. No; there is no objection, except I would like to have the record show that is the situation. We are not objecting to the admission of these various papers, but I would like to have the record show, he having previously testified that he became manager in May 1927, that it necessarily follows that his knowledge is not personally, but gained from the records only.

The MEMBER. The record will show what that is.



446 Mr. LEMING. Of course, the record will show the subpoena is directed to the American Surety Company to produce this kind of collateral applicable to this bond.

Q. Mr. Keating, your subpoena, as you agreed on examination a few moments ago, called for the collateral applicable to this bond shown as Respondent's Exhibit P, being the bond described in the subpoena; now, in response to that subpoena you have produced a certificate of deposit, have you not?

A. Yes, sir.

Q. And that is Certificate of Deposit No. 696, about which you have just been testifying?

A. Yes, sir.

Q. And did you say you had produced the file in respect of that bond also?

A. Yes, sir.

Q. May I see it, please?

[Witness hands paper to Mr. Leming.]

Q. Having examined it yourself, Mr. Keating, do you identify Respondent's Exhibit P, that is, the bond with your file?

A. A comparison of the original bond with the carbon copy in the file indicates that is the bond called for.

Mr. LEMING. May I have the certificate of deposit a moment, please?

[Clerk hands paper to Mr. Leming.]

Mr. LEMING. Would you like to see that, Mr. Gillespie?

Mr. GILLESPIE. Yes.

[Mr. Leming hands paper to Mr. Gillespie.]

Mr. WHITE. Do you propose to leave the copy here?

447 Mr. LEMING. I expect to have it photostated.

May this be passed to his Honor, please, in view of some other possible discussion?

(Clerk hands paper to Member.)

By Mr. LEMING:

Q. Do you have a photostat of that certificate of deposit with you, Mr. Keating?

A. No, sir; I do not have a photostat of the certificate.

Mr. WHITE. If that is an exact copy, we have no objection to your using that.

(Discussion off the record.)

Mr. WHITE. That is quite all right. We accede to the use of the copy as a substitute for the original.

Mr. LEMING. None of us want to take the responsibility of taking that out of the custody of the witness, your Honor.

The WITNESS. Not at all.

Mr. LEMING. You will remember Mr. Foster testified it is good for \$25,000.



By Mr. LEMING.

Q. Now, on the copy I have here of it, I believe you said, Mr. Keating, the face is—

A. Is exactly the same.

Mr. LEMING. May I ask the Reporter, then, if he will, to make the same notation on the back of this copy as appears on the back of the original certificate of deposit 696.

(The notation referred to was made by the Reporter.)

By Mr. LEMING:

Q. This certificate of deposit No. 696 was produced from the files of the American Surety Company in New York, Mr. Keating?

448 No; it was produced from our vault in the First National Bank of Scranton, Pennsylvania.

Q. When you say from our vault, you mean the vault of—

A. Of the American Surety Company of New York.

Q. And the certificate was in that vault for safe keeping?

A. Yes, sir.

Q. And you were directed to respond with it, along with the other matters named in the subpoena?

(Mr. Leming hands paper to counsel for Petitioner.)

(Discussion off the record.)

Mr. LEMING. If your Honor please, by agreement of counsel, we are substituting at this time a compared copy of that original certificate of deposit. I would like to have the original itself introduced in evidence and marked as Respondent's next exhibit and immediately to hand it back to the witness on the stand and substitute in lieu of it the copy.

Mr. GILLESPIE. No objection.

The MEMBER. It may be admitted and marked as Respondent's next exhibit and a copy may be substituted immediately thereafter.

The CLERK. Exhibit TTT in evidence.

(The document referred to was received in evidence, and was marked "Respondent's Exhibit TTT," and made a part of this record.)

Mr. LEMING. Now, if the Clerk will kindly mark the substituted copy to be used in lieu of the original exhibit TTT.

449 The CLERK. The copy has been marked Respondent's Exhibit TTT.

(Whereupon a copy of the original exhibit TTT was admitted and marked in lieu of the original.)

Mr. LEMING. I now return to the witness on the stand original certificate of deposit 696 of the Miners Savings Bank, in the name of the American Surety Company.

Mr. WHITE. In the presence of fifty witnesses.



By Mr. LEMING:

Q. Mr. Keating, is this bond now marked as Respondent's Exhibit-P still outstanding?

A. Yes, sir; that bond is still outstanding.

Q. And the American Surety Company retains that collateral in respect of it?

A. Yes, sir; that is correct.

Q. Mr. Keating, referring to the three bail bonds in the names of McHugh, McGowan and Bossart, was collateral deposited with the American Surety Company in respect of those bonds?

A. Yes, sir.

Q. Now, does your record show what became of that collateral after it ceased to be required as collateral on the bonds you have described, or successor bonds which may have followed them and which were dependent on the same collateral?

A. Our records show to whom we returned the collateral; yes.

Q. Will you present that record, please; may I see the record? [Witness hands papers to Mr. Leming.]

By Mr. LEMING:

Q. This is one of the regular—this document came from the regular files of the American Surety Company?

450 A. Yes, sir.

Q. Where they are customarily kept?

A. Yes, sir.

Q. And you are producing it here today in response to the subpoena to produce?

A. Exactly so; yes, sir.

Q. And this document you have handed me consists of two papers, does it not?

A. Yes, sir.

[Mr. Leming hands paper to counsel for Petitioner.]

Mr. LEMING. May this document be marked for identification?

The MEMBER. It may be marked for identification.

(Discussion off the record.)

Mr. WHITE. Will you mark those separately, please? As to one there will be no objection, but as to the other there might be.

The MEMBER. They will be marked separately.

The CLERK. UUU and VVV for identification.

(The documents referred to were thereupon marked "Respondent's Exhibits UUU and VVV," for identification.)

Mr. LEMING. Mr. Keating has just handed me a photostat of that, and if this photostat may be substituted now—

[Hands paper to counsel for petitioner.]



I believe it is agreed at this time we can turn the original sheets to Mr. Keating and substitute in place the photostatic copies which he has furnished.

Mr. GILLESPIE. They may be marked for identification separately, as the originals were.

451 Mr. LEMING. The photostat consists of three photostats, but the second one under the clip is simply the reverse side of the principal document, Certificate No. 196, so that the first two photostats there may be marked as the first exhibit for identification, and the last photostat as the second letter for identification.

(Whereupon the photostatic copies referred to were substituted in lieu of the originals of Respondent's Exhibits UUU and VVV.)

The MEMBER. We will take a short recess at this time.

(Whereupon a recess was taken.)

Mr. LEMING. You may cross-examine, Mr. Gillespie.

Mr. GILLESPIE. Mr. White will cross-examine.

Cross-examination by Mr. WHITE:

Q. Mr. Keating, I understand you to have previously testified that you have been the manager of the Scranton Branch of the American Surety Company since May 1927?

A. That is correct; yes, sir.

Q. I understand you to have said in response to questions by the Government's counsel that on occasions your company executes bonds on the responsibility of the principal alone; is that correct?

A. That is correct; yes, sir.

Q. So that it follows that it is not always necessary to require either collateral or an indemnity agreement?

A. No.

452 Q. Now, I direct your attention to Respondent's Exhibit VV, which is a paper you have produced here in response to a subpoena, and I ask you by what designation is that known in your company?

A. This is what we call a third party indemnity agreement. In other words, this is an agreement taken usually from a third party when the principal on the bond is not financially responsible to a sufficient amount to enable us to write the bond. It is additional security or endorsement; it is similar to endorsement on a note.

Q. I see. Then, of course, in the acceptance of such an agreement your company first makes an investigation about the responsibility of the principal, and then of the indemnitor or indemnitors; is that correct?

A. Yes.



Q. Does your company make an investigation to ascertain whether or not there is any connection with the business or matter intended to cover the bond with the indemnitor?

A. No, sir.

Q. Does your company, to your knowledge, have any policy with respect to the acceptance of indemnity agreements, referring now to association of the indemnitor with the business or matter for which the bond is sought?

A. Well, to my mind, the terminology of the third party indemnity agreement is to some extent self-explanatory. It is a third party agreement. In other words, one party applies to us for a bond in connection with a certain business or transaction, and that party is not financially responsible to a sufficient extent, and then we ask him to get someone else as an endorsement; as an endorser or indemnitor.

453 Q. Then, you place the indemnity agreement in the same category, as I understand it, with one who might apply to a bank for a loan and the bank not being satisfied with his financial standing, requests some security by way of endorsement.

A. Exactly. That comparison is correct.

Q. It does not necessarily follow from that set of circumstances that the endorser in the case of the note, or the indemnitor here, has any interest in the matter or business for which the bond is given?

A. No, sir; that would not follow naturally.

Mr. WHITE. May I see the certificate of deposit?

The CLERK. Yes.

By Mr. WHITE:

Q. I show you respondent's Exhibit TTT, which is the certificate of deposit No. 696. I note that the certificate of deposit is dated as of a date prior to the time you became associated with the American Surety Company; is that correct?

A. That is correct.

Q. And of course, you have no personal knowledge of the receipt of this certificate of deposit?

A. No, sir.

Q. And you produce it here merely in response to the subpoena as a representative of the American Surety Company?

A. Yes, sir.

Q. I understand you to have said this certificate comes from the strong box of the American Surety Company in the First National Bank at Scranton?

A. That is correct.

Q. Will you explain why this endorsement appears on the back, "American Surety Company, by W. G. Keating, Resident Vice President?"



454 A. My recollection of that is, at a recent audit of the office the auditor wished to secure a new certificate of deposit, because this is dated 1925, and it is customary for us to secure new certificates every once in a while. I believe I endorsed the certificate, and he intended to go to the bank and get a new certificate, but for some reason he did not follow it through. That is, to the best of my recollection, the explanation of the endorsement on the back. I am not sure whether that is correct, either.

Q. Reference has been made here to three bail bonds; you were asked whether or not there was security put up at the time that your company issued these bail bonds, and I understand your answer to have been yes; is that correct?

A. That is correct.

Q. Do the records that you have produced here show by whom that collateral, or whatever it is, was put up?

A. Yes, sir.

Q. Will you refer to the record, now, please and let me see it? [Witness hands paper to Mr. White.]

Mr. WHITE. The witness has produced the original of Respondent's Exhibit UUU.

Mr. LEMING. For identification.

Mr. WHITE. Yes; for identification.

By Mr. WHITE:

Q. This exhibit marked for identification as "Respondent's Exhibit UUU," appears to be a receipt by the American Surety Company, with your signature on it, dated June 26, 1927; is that correct?

A. Yes, sir.

Q. And indicates the receipt from John M. Jones, attorney in fact, of certain collateral?

A. Yes, sir.

Q. As collateral to these bail bonds you have spoken about?

455 A. Yes, sir.

Q. It indicates, too, that you received them?

A. Yes.

Q. And by whom was the collateral delivered to you?

A. John M. Jones, attorney in fact.

Q. And who was John M. Jones?

A. He was our agent at Wilkes-Barre, Pa.

Q. Now deceased?

A. Yes.

Q. Is that true?

A. That is correct.



Q. Do you know for whom John M. Jones was attorney in fact?

A. No.

Mr. LEMING. If he knows.

By Mr. WHITE:

Q. At that time?

A. No, sir.

Q. When the collateral was delivered to you by John M. Jones, was he alone or accompanied by someone, if you remember?

A. To the best of my recollection he was accompanied by Mr. McHugh, and I think, perhaps, Mr. Gillespie was with him; I am not sure.

Q. Now, to refresh your recollection, the applications for the bail bonds you have testified show that the attorney for the parties was Abram Salsburg; now, whether or not it was not Mr. McHugh and Mr. Salsburg?

A. It might have been. This was in 1927 and my recollection is not too clear, and I do not see how I can refresh it. There is nothing to associate to my mind who might have come up with Mr. Jones. It is possible it might have been Mr. Salsburg and Mr. McHugh.

456 Q. Is that the best of your recollection?

A. Yes.

Q. Mr. Keating, did you ever see the petitioner, Mr. John Kehoe, in connection with this matter?

A. No, sir.

Q. Did he deliver any of the security that appears on this receipt which we have referred to here to you?

A. No, sir.

Q. Or appear with the parties at the time that the collateral was delivered to you?

A. No, sir.

Q. That is all.

Redirect examination by Mr. LEMING:

Q. The Mr. McHugh you referred to, is that William F. McHugh?

A. William F. McHugh; yes, sir.

Q. And he is one of the same names involved in those bail bonds?

A. Yes, sir.

Q. I believe you said that the American Surety Company makes no investigation of the indemnitor on the indemnity agreement in respect of his interest in the subject matter of the bond?

A. No, sir. We investigate his financial responsibility.

Q. But you do not try to determine the indemnitor's interest in the matter?

A. No.



Recross examination by Mr. WHITE:

Q. Of course, in the course of your investigation  
457 you may or may not learn the connection, if one exists?

A. It is quite possible, particularly if they tell us of such a connection.

Q. And according to the files was there any connection found in the course of that investigation between the indemnitors and the principal on the bond?

A. There is nothing in the file to show any connection between the indemnitors and the principal.

Mr. WHITE. That is all.

Redirect examination by Mr. LEMING:

Q. Part of the file has been destroyed, has it not, Mr. Keating?

A. Part of which file, may I ask?

Q. That file in which that indemnity agreement and the original bond in support of which the indemnity agreement was made?

A. Yes, sir; the entire file has been destroyed in that case, with the exception of the indemnity agreement.

Mr. LEMING. That is all.

Recross-examination by Mr. WHITE:

Q. Mr. Keating, you referred in the course of direct examination to some Company record indicating the destruction of papers in connection with the same bond for which that indemnity agreement was given?

A. Yes, sir.

Q. And do I understand that the date of destruction shown by the record was some time in 1932?

458 A. The record shows, according to the pencil notation that the file was destroyed June 2, 1932.

Q. June 2, 1932?

A. Yes.

Mr. WHITE. That is all.

Redirect examination by Mr. LEMING:

Q. Do you know anything about the destruction of the file except as you get information from that card before you?

A. No, sir; that is all. This comes to me from New York.

Mr. LEMING. I would like to offer in evidence the card the witness has been testifying from:

Mr. WHITE. Just let me see the card, please.

Recross-examination by Mr. WHITE:

Q. And the destruction of the file or documents referred to here took place where?

A. In New York City.



Q. In New York?

A. Yes.

Q. So that the record will be entirely clear as to this paper which the Government counsel just now offered in evidence, it appears that in your file and registration division, on August 16, 1934, a request was made for papers in connection with Bond A-2769-B, and that the card was returned with the pencil notation "6-2-32 destroyed?"

A. Yes, sir; that is correct.

Mr. WHITE. I have no objection.

459 Redirect examination by Mr. LEMING:

Q. You do not know where the records were destroyed, Mr. Keating; as I understand, all you know is that is what the card shows?

A. I assume I am not the best evidence as to where it was destroyed.

Q. You have no personal knowledge of that?

A. No.

Q. You have no personal knowledge as to where the records were destroyed?

A. No.

Q. In this particular case you have no personal knowledge as to where or when the records were destroyed?

A. No, sir.

Mr. LEMING. That is all.

Recross examination by Mr. WHITE:

Q. But the general practice of the company is to destroy records at the headquarters in New York?

A. They are always destroyed there.

Q. And you, as manager of the branch office, have no authority to destroy them?

A. No. We forward them to New York.

Mr. WHITE. That is all.

Redirect examination by Mr. LEMING:

Q. I have no desire to pursue this much farther, Mr. Keating, but when you say they are always destroyed in New York, are you saying that because you have seen all of them destroyed personally?

460 A. No, sir.

Q. You have not seen them destroyed personally?

A. No, sir; I have not seen one of them destroyed.

Mr. LEMING. That is all.

Mr. WHITE. That is all.

The MEMBER. It will be admitted and marked.

The CLERK. Respondent's Exhibit WWW.



(The document referred to was received in evidence, and was marked "Respondent's Exhibit WWW," and made a part of this record.)

Whereupon WILLIAM V. LOUGHRAN was called as a witness by and on behalf of the respondent and, having been first duly sworn was examined and testified as follows:

Direct examination by MR. LEMING:

Q. You have stated your name, have you, Mr. Loughran?

A. I have.

Q. It is William V. Loughran?

A. That is right.

Q. What does the "V" stand for?

A. Vincent.

Q. How do you spell it?

A. V-i-n-c-e-n-t.

Q. Where do you live, Mr. Loughran?

A. Scranton.

Q. Pennsylvania?

A. Pennsylvania.

Q. How long have you resided in Scranton?

461 A. About 44 years, except a few years that I was out of the city.

Q. About 44 years?

A. Except a few years that I was out of the city.

Q. Were you born and raised in this locality?

A. Yes, sir.

Q. What is your present business or occupation, Mr. Loughran?

A. Owner of a hotel and restaurant.

Q. Will you talk so his Honor can hear you?

A. I am the owner of a hotel and restaurant; hotel and restaurant proprietor.

Q. What hotel do you own and operate now?

A. Hotel Loughran.

Q. What was your business in 1924?

A. Beer brokerage.

Q. Beer broker?

A. Yes.

Q. And in 1925?

A. Beer brokerage.

Q. And in 1926?

A. The same.

Q. And by beer brokerage you mean that you were buying and selling beer?

A. Yes.

Q. Near beer?

A. I do not know what it was. I bought it, but I never tested it.



Q. How much did you pay for it per barrel?

A. From \$12 to \$16 or \$17.

Q. Did the price of beer vary from 1924 to 1925?

A. The price fluctuated on beer at all times.

Q. What was the highest price you recall paying in those years for it?

A. I cannot just recall. I think about \$16 was the highest, or possibly \$17 on occasions.

462 Q. What would that be; a half barrel, a barrel, or what?

A. A full barrel.

Q. Full barrel?

A. Full Barrel.

Q. Do you recall, for instance, in 1924, what the range of the price was?

A. In 1924?

Q. Yes.

A. Around \$13 or \$14, I am pretty sure.

Q. That is, the price you paid for it ranged from \$13 to \$14?

A. Around that?

A. Per barrel?

A. Yes.

Q. And how did the price range run in 1925?

A. I imagine it was the same in 1925. When beer was plentiful, you could get it cheap, but when it was scarce, you paid more for it.

Q. How about 1926; was it getting cheaper or higher?

A. I cannot recall. It has been quite a while since I was in the business and I cannot recall.

Q. What breweries did you buy from in those years?

A. I bought from various breweries.

Q. Will you state some of them?

A. I do not wish to state any brewery or implicate any brewery that has not been mentioned.

Q. All right, name those which have been mentioned. I do not know what that means, but name one that has been mentioned.

A. I do not wish to name any breweries.

Q. Well, his Honor will have to determine whether you shall answer or not.

463 A. I do not wish to incriminate myself, and I do not wish to answer, your Honor.

The MEMBER. You are taking the position now you are claiming the privilege of not answering under the claim that it might tend to incriminate you; am I to understand that?

The WITNESS. May I explain it?

The MEMBER. I will hear what you have to say.



The WITNESS. I was subpoenaed before the Grand Jury several years ago in Harrisburg, and before the Grand Jury I was asked a number of questions by Mr. Leming, before entering the Grand Jury Room. I answered them to the best of my knowledge. My answers displeased him so he threatened to indict me for perjury. Since these transactions I had with numerous breweries and brokers are out of my mind, I cannot answer the question.

The MEMBER. Is your answer now you do not know what breweries you dealt with?

The WITNESS. I do not care to answer on the ground of incriminating myself.

By Mr. LEMING:

Q. Who was present when I threatened you, as you stated?

A. I cannot just recall. I know you threatened to indict me for perjury, if I went into the Grand Jury Room and gave the same answers I gave you.

Q. Did you ever talk to me at any time except in the presence of Special Agent Lucas or Mr. Greenwald?

A. I cannot recall whether they were there or not.

Q. Did you testify before the Grand Jury?

A. I did.

464 Q. At Harrisburg?

A. At Harrisburg.

Q. Did you testify before a grand jury at Scranton?

A. Before a grand jury at Scranton?

Q. Yes. Scranton, Pennsylvania, in the same connection?

A. I do not think so.

Q. You do not recall testifying here in 1932 before a grand jury in Scranton?

A. I do not recall.

Q. Did I examine you before the Grand Jury at Harrisburg?

A. You did.

Q. Did I examine you before a grand jury at Scranton?

A. I do not recall any grand jury in Scranton.

Q. You do not recall being here in March 1932?

A. What is that?

Q. You do not recall being here in March 1932?

A. In Scranton?

Q. Yes.

A. I was called to Harrisburg. I do not know just when it was.

Mr. LEMING. If your Honor please, in view of what the witness has said, I should like for him to step aside while I take the witness stand.

(Witness excused.)



Whereupon MASON B. LEMING was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

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## DIRECT EXAMINATION.

The WITNESS. I ask this privilege, if your Honor please, because of the statement made by this witness that I threatened him; that I threatened to have him indicted for perjury. That statement is an unmitigated lie. I have been practicing law for a little over 25 years. I have never in my career made a threat against any witness or any person. Mr. Loughran's conduct toward me at Harrisburg and toward me at Scranton later was always courteous; my conduct toward Mr. Loughran at Harrisburg and at Scranton was always courteous. I made no such statement to him and I did not threaten him with any indictment or in any other manner.

You may cross examine.

Mr. WHITE. No questions.

Mr. GILLESPIE. No cross examination.

Mr. LEMING. Now if the witness may resume the stand.

Thereupon, Mr. Leming presented to the witness certain signature cards covering accounts carried in the Anthracite Trust Company, in the names of W. J. Vincent, William V. Loughran, and Frank R. O'Hare, and asked the witness if he could identify the handwriting on such cards. The witness refused to answer, on the ground that his answers might incriminate him.

The witness was then asked if he maintained an account at Anthracite Trust Company. He refused to answer on the ground that his answer might incriminate him.

466 Mr. Leming then presented to the witness a Treasurer's check dated May 4, 1925, on the Anthracite Trust Company payable to W. J. Vincent in the sum of \$35,000.00, and twenty-four (24) New York drafts issued by the Anthracite Trust Company in 1925 payable to cash. Fourteen drafts were in the sum of \$40,000.00 each, five in the sum of \$35,000.00 each, two in the sum of \$10,000.00 each, and the remainder in the sums of \$20,000.00, \$30,000.00, and \$50,000.00, respectively. Mr. Leming asked the witness whether or not those drafts, or any of them, were charged to his account at the Anthracite Trust Company. The witness again refused to answer, on the ground that his answers might incriminate him.

Mr. Leming then presented to the witness respondent's Exhibit RRR, being a draft dated May 7, 1926, payable to Cash, and endorsed on the reverse side "W. J. Vincent," and asked the witness whether or not that draft was charged to any of his



accounts with the Anthracite Trust Company. The witness refused to answer, on the ground that his answer might incriminate him.

The witness was asked if he knew William F. McHugh, and answered that he had known him for several years prior to his death.

Mr. Leming also asked the witness whether he ever purchased any beer from Bartel's Brewery; whether he delivered any of the aforementioned 24 drafts to either William F. McHugh or to John Kehoe; what his testimony would be as to what he did with the aforementioned Treasurer's check and the 24 drafts if it were shown that they were charged to his accounts at the Anthracite Trust Company; and whether or not said check and drafts were delivered to William F. McHugh. The witness  
467 refused to answer all of the aforesaid questions, on the ground that his answers might incriminate him.

Thereafter, the following proceedings were had. Mr. Leming addressed the Member as follows:

*Colloquy*

Now, with respect to any refusal to testify because one might incriminate himself, particularly if he has in mind the perjury statute the question, of course, arises as to what is the truth.

For instance, a man might make a conflicting statement, his last statement being in conflict with the first. That does not mean he would be subjected to prosecution for perjury, necessarily, until the question is established as to which statement is the truth.

So, it seems to me, your Honor, that in this proceeding where we only have one issue, and that is the question of income tax liability, whatever the facts are in respect of that income tax liability are material, whether in the possession of this witness or any other witness, and might or might not be of aid to the Board in determining the issues in an appeal such as this.

I would like to inquire, therefore, if your Honor will rule after such questioning and ascertainment of the facts that you desire upon the witness' refusal to answer so that we may be advised in the premises.

The MEMBER. Very well, Mr. Loughran, if I recall your answers correctly, you stated in your answer to practically every question that was asked that you refused to answer on the  
468 ground that your answer might incriminate yourself?

The WITNESS. Yes, sir.

The MEMBER. You were further asked how and would you mind stating what you replied?



The WITNESS. I said I was not a lawyer, and I am not familiar with the law, and for that reason I was not prepared to answer the question.

The MEMBER. Are you acting on the advice of counsel?

The WITNESS. I am, sir.

The MEMBER. Is your attorney or counsel in the room?

The WITNESS. Yes, sir.

The MEMBER. Who is that, please?

The WITNESS. Mr. John Menolo.

The MEMBER. Mr. Menolo.

Mr. MENOLO. Yes, sir.

The MEMBER. Are you acting as the attorney for the witness in this case?

Mr. MENOLO. Only as adviser. He sought my advice on certain questions.

The MEMBER. Are you generally admitted to practice as a lawyer in the State of Pennsylvania?

Mr. MENOLO. Yes, sir.

The MEMBER. In other words, a member of the Pennsylvania State Bar?

Mr. MENOLO. Yes, sir; and the United States District Court and the Circuit Court of Appeals.

The MEMBER. (To the witness.) On Mr. Menolo's advice you have refused to answer the question?

469 The WITNESS. No; Mr. Menolo did not tell me to refuse to answer those questions. I do not assume he knew what the questions were they were going to ask, but he did tell me I had the privilege where I thought it would incriminate me it was not necessary to answer.

The MEMBER. Where you thought it was incriminating?

The WITNESS. Yes, sir.

The MEMBER. You did not discuss with him the nature of the questions that you anticipated?

The WITNESS. No, sir.

The MEMBER. And how they might incriminate you?

The WITNESS. No, sir.

The MEMBER. So he did not know or did not advise you on that as a general proposition?

The WITNESS. That is right.

The MEMBER. Except that you could refuse to answer?

The WITNESS. Any question I thought was intrinsically.

The MEMBER. You must have had something to base an opinion on as to why and how you considered that your answers in this regard might incriminate you?

The WITNESS. I had lots of opinions, but I am not certain about any of them, for that reason I figured I might incriminate myself.



The MEMBER. Mr. Menolo, have you been in the court room during the hearing?

Mr. MENOLO. Yes, sir; I have been here all week.

470 The MEMBER. Under the circumstances we will take about a 15 minute recess at this time before I question any further, or inquire further about these matters. It gives you an opportunity of conferring with your attorney with regard to the specific questions which have been asked of you, if you desire to do so.

The WITNESS. Your Honor, I need more time than that.

The MEMBER. Well, I am going to give you that much time at this time, and when we reconvene we will consider the question of more time with reference to these questions, that have been asked of you here.

I may state this, that generally speaking it is the function of a court or tribunal in hearing a proceeding to consider the question as to whether or not there is justifiable grounds for the claim. In other words, although the witness has a wide latitude, he is not permitted to use that reasoning merely as a means of avoiding to testify in a proceeding to which he is not a party, and to use that means to avoid giving testimony.

Now, sitting as a Member of the Board in this hearing, since the matter has reached the point it has, of course, I desire to satisfy myself on that point and the facts as nearly as may be before making a ruling.

We will now recess for 15 minutes, and if any further time is needed, we will consider those matters when we come to them.

(Thereupon a recess was taken for 15 minutes, at the conclusion of which the following occurred:)

471 The MEMBER. You will resume the stand, Mr. Loughran.

Mr. Loughran, in refusing to answer the questions asked by counsel on the ground it might incriminate you, that your answers might incriminate you, were you speaking generally, or did you have in mind a specific criminal charge that might be brought against you?

The WITNESS. A specific criminal charge.

The MEMBER. What is that?

The WITNESS. Perjury.

The MEMBER. Do you wish to let your answers stand with reference to the questions asked, after further advice from counsel with reference to that specific charge, having in mind the nature of the charge and the statute of limitations with reference to that charge; in other words, with the idea that at the present time your answers to those questions might subject you now to prosecution?



The WITNESS. There are probably several of those questions I might answer.

The MEMBER. With reference to others, is it your decision, after the recess, that the answers you would give might at the present time subject you to criminal prosecution on that charge?

The WITNESS. Yes, sir.

The MEMBER. Do you think that you might be able to distinguish the questions that you would be willing to answer now?

The WITNESS. I do not recall just exactly what they were, your Honor.

472 The MEMBER. But there are some of the questions that have been propounded that you might now be in a position to answer?

The WITNESS. Yes, sir.

The MEMBER. Speaking generally, with reference to the question, since there are still some questions on the record that the witness desired his answer to stand and would answer in the same manner, the Board at this time does not feel that it has sufficient information as to the facts on which to base its ruling. There is also a question with reference to the various ramifications of the law with reference to any such question and on that point the ruling of the Board will be deferred until we convene after a recess, on Monday at 2 o'clock.

After the recess, Mr. Leming asked the witness certain questions, the substance of which is set forth below; and as to each question the witness refused to answer, on the ground that his answer might incriminate him.

In whose handwriting were the signatures on the signature cards in the names of W. J. Vincent, William V. Loughran, and Frank R. O'Hare?

Whether he at any time in the year 1924 or in the year 1925 bought any New York draft from the Anthracite Trust Company which was charged to any of his accounts, and with which he purchased beer.

Whether he bought any draft or cashier's or treasurer's check at the Anthracite Trust Company in the year 1925 which he used to buy beer from McGowan's Brewery.

Whether he ever bought beer from McGowan's Brewery.

473 Whether he ever delivered any New York draft drawn on the Anthracite Trust Company to William F. McHugh or to John Kehoe for the purchase of beer from McGowan's Brewery.

Whether he recalled a conversation had with one Grunewald, Special Agent of the Internal Revenue Bureau, in November 1930, at Cleveland, Ohio; or a conversation which he had with Messrs. Grunewald and Malone, Special Agents of the Internal



Revenue Bureau, on March 7, 1931, in the office of the U. S. Attorney at Cleveland, Ohio; and whether he recalled a conversation had with Messrs. Grunewald, Malone, and Lucas, Special Agents of the Internal Revenue Bureau, at Scranton, on November 24, 1931.

Whether he informed a Grand Jury at Harrisburg, Pennsylvania, of the name of the person to whom he had handed drafts of Anthracite Trust Company in payment for beer purchased at Bartel's Brewery or McGowan's Brewery.

Whether there was any difference between the identity of the person about whom he informed Special Agent Grunewald in February 1930, if he so informed him, and the identity of the person about whom he informed the Grand Jury in December 1931, if he so informed them.

Whether he at any time in the years 1925 or 1926 maintained any bank account under any name except his own.

Mr. Leming thereupon renewed his request for a ruling by the Member on the right of the witness to refuse to answer the aforementioned list of questions.

Mr. Memolo, attorney for the witness, and Mr. Leming, 474 counsel for respondent, argued the question, and the Member thereupon made the following ruling:

The MEMBER. Mr. Loughran, I want to ask you one question, have you within the three years past testified, or in other words made statements under oath dealing with the subject matter on the questions about which you have claimed a privilege?

The WITNESS. I have.

The MEMBER. This question now before this division of the Board, of course, in a way, involves the right of the Board to require the attendance and the testimony of the witness.

The Revenue Act of 1926 gives the Board the power to require the attendance and testimony of witnesses, and there is no question but that that power can be enforced.

In this case, however, we have a question which varies from that big general question. The witness has attended and been sworn, and upon the propounding of certain questions to him, has claimed the privilege of not answering upon the ground that the answers to the questions might incriminate him.

That privilege is claimed, of course, under the language of the Fifth Amendment, and it might be said that it is a privilege against the employment of legal process to extract from his own lips an admission of his guilt which will thus take the place of other evidence. That is the statement, or in other words, that is the way Mr. Wigmore puts it.

This rule contained in the Constitution has a long history back of it, and it developed by reason of certain conditions that ex-



isted several hundred years back. It has been the sub-  
475 ject for consideration by the court from the time of the  
Constitution on down to the present time. But, my exami-  
nation of the authorities causes me to reach the opinion that  
probably as good a statement of the rule that can be found at the  
present time is to be found in the statement of Chief Justice  
Marshall in the Burr Treason Trial.

We have had since that time many variations of facts, cir-  
cumstances, and conditions under which the question has arisen,  
and we have had the various rulings made specifically which  
applied to those sets of facts and conditions. But, they all get  
back to the general rule there laid down.

Chief Justice Marshall said:

"When a question is propounded, it belongs to the court to  
consider and decide whether any direct answer to it can implicate  
the witness; if this be decided in the negative, then he may  
answer it without violating the privilege which is secured to him  
by law. If a direct answer to it may criminate himself, then he  
must be the sole judge what his answer would be; the court can-  
not participate with him in this judgment, because they cannot  
decide on the effect of his answer without knowing what it would  
be, and a disclosure of the fact to the judges would strip him of  
the privilege which the law allows and which he claims."

Clearly that leaves to the court, where the privilege is claimed,  
the duty of determining whether or not an answer given to a  
question propounded may reasonably incriminate the witness. It

is usually true, I do not know of any instances where it is  
476 not, that most any question that is propounded is suscepti-  
ble of at least two answers. If one of those answers given  
would tend to incriminate him, then, according to my view under  
the rule laid down, and which appears to me to have been fol-  
lowed by the court, that such an answer may reasonably incrimi-  
nate the witness or cause him to testify against himself, then the  
privilege is properly claimed, and to require a witness to make  
such an answer, or to show specifically that he would give such  
an answer, would be invading the privilege itself, and would  
make the privilege granted him under the Fifth Amendment use-  
less. Such seems to be the situation here.

The witness has concluded that a particular answer he might  
make might incriminate himself with reference to the crime of  
perjury.

It appearing as a fact that he has testified under oath within  
three years concerning the subject-matter involved as to the ques-  
tion asked, and as to which he has claimed the privilege. If the  
Board in this case were in possession of the facts, and it would



indicate his answer would be inconsistent, then it might well be the problem of this tribunal to rule that he would not jeopardize himself, and that the privilege is erroneously claimed. But, as I see it, and understand the rule, I could not require an answer to such a question to clear up any situation without invading the privilege granted and the Constitution.

For that reason, I hold that the witness may not be required to answer.

MR. LEMING. May an exception be noted.

477 THE MEMBER. An exception will be noted.

MR. LEMING. You may cross-examine.

MR. GILLESPIE. We have no cross-examination to make.

(Witness excused.)

*Offers in evidence*

MR. LEMING. If your Honor please, I offer in evidence document heretofore identified as Respondent's Exhibit RRR, being the draft of the Anthracite Trust Company dated May 7, 1926, No. 24650, payable to the order to W. J. Vincent, in the amount of \$11,000. This is the draft that Mr. Farrar testified bears the endorsement of W. J. Vincent in the handwriting of this petitioner.

That exhibit is offered in evidence for the purpose of showing the fraud in the proceedings now pending before your Honor.

It is appropriate to offer evidence of similar acts in cases of this kind as with respect to other years. We find in this offer the handwriting of the petitioner. It is offered to show that not only in 1925 was he transacting his financial affairs under some other name, but this draft shows him writing in his own handwriting this \$11,000 draft in the year 1925 in a name not his own.

MR. GILLESPIE. If your Honor please, there are several reasons why this should not be admitted in evidence against the petitioner, or particularly against the petitioner John Kehoe.

In the first place, you will observe this check is dated May 7, 1926, and if it follows from the mere fact that an expert has said this handwriting, that is, the name of W. J. Vincent, is 478 in the handwriting of John Kehoe, assuming that the name of W. J. Vincent upon the draft is, as testified to by the expert in his opinion the handwriting of John Kehoe, you will bear in mind that it does not apply to his income of 1925 which is the matter now being tried before your Honor, and made the basis of the charge of fraud, and for that reason it is not admissible.

Now, in the next place there is no connection made by any proof in this case that this draft, or the proceeds of this draft reached the hands of John Kehoe, and was a part or portion



of the income of the profits of the McGowan Brewery or the Bartel's Brewery, so-called.

There is not a single chain of evidence tying John Kehoe up with that particular income, and it does not show any more than any other draft with the endorsement in his handwriting on the back. Perhaps if it were admitted by him, it would not show that it was proof of fraud, or a single link in the chain against him as to his income tax return for 1925.

Any check might be produced here, for the most innocent purposes as a matter against him, if it would be permitted to be put in evidence as a matter of record.

There is nothing at all upon the face of it, or any other evidence already adduced from which the presumption might be adduced that this came from Bartel's Brewery, or from any person named in this case, and in no way can it be taken, or any inference be drawn from it, that it was income to him that he did not account for in the year 1925.

For that reason we respectfully object.

479 The MEMBER. Do you wish to say anything further, Mr. Leming?

Mr. LEMING. I believe not, your Honor, except this fact, that it is offered to show similar acts in the conduction of his business under some name other than his own, which is one of the principal questions involved in the issues before the Board, and this Board has ample authority for the receipt of that sort of evidence.

Mr. GILLESPIE. It would be inconsistent with innocence as well as guilt. It has to stand by itself.

The MEMBER. It will be admitted and we will consider its weight.

Mr. GILLESPIE. For the present I ask for an exception.

Mr. LEMING. The offer has been previously identified as RRR.

The MEMBER. It will be admitted in evidence as Respondent's Exhibit RRR.

(The document referred to was received in evidence and marked "Respondent's Exhibit RRR," and made a part of this record.)

Mr. LEMING. I believe notice to produce was served on the petitioner to produce a letter dated January 3, 1930, addressed to Mr. John Kehoe from the Commissioner. If counsel wishes to retain the original, I have a certified copy of the duplicate and I will just use that.

Mr. GILLESPIE. That is all right, if you will let us compare it. (After comparison.) That is all right.

Mr. LEMING. I offer in evidence letter dated January 3, 1930,



addressed by the Commissioner of Internal Revenue to the Petitioner; this letter reads as follows:

480 "While it is the policy of the Bureau to make as few inspections of books of account and records of taxpayers as possible, it seems necessary, before finally closing your case, to make a reinvestigation of your books and records for the years 1923 to 1926, inclusive, in order to properly verify your returns for those years. A reexamination, therefore, will be made.

"I am sure you will permit our representatives to have access to all of your books and records and that you will cooperate fully with them. I trust this will not cause you any inconvenience.

"This notice is sent in compliance with Section 1105 of the Revenue Act of 1926."

Counsel for the petitioner has kindly produced the original and agreed that the certified copy may be offered.

I now offer the certified copy in evidence for the purpose of showing the action taken by the Commissioner in reopening the Petitioner's case.

Mr. O'HARA. We object to the introduction of this letter in evidence. It is apparently offered to show compliance with that provision of the statute relating to unnecessary examination of books and records.

It is our position after the statute of limitations has run and there has been an examination and determination, and there has been a closing agreement, the Commissioner cannot legally make any further examination under record, and we will object to the introduction of this for that reason.

481 The MEMBER. It will be admitted as Respondent's Exhibit CCCCC; the objection will be overruled.

Mr. O'HARA. We note an exception.

The MEMBER. Exception noted.

(The document referred to was received in evidence and marked "Respondent's Exhibit CCCCC," and made a part of this record.)

Mr. LEMING. We offer in evidence certified copy of an order of the Acting Secretary of the Treasury approved February 13, 1932, revoking a so-called closing agreement theretofore entered into between the petitioner and the Commissioner in December 1927.

The document is offered for the purpose of showing the action on the revocation by the Secretary, and not proof of the contents contained therein other than the proof of the act of revocation of the Secretary of the Treasury.

Mr. O'HARA. We object to the admission of this document in evidence, and in support of our objection we point out that the



Board has in numerous cases held that it has jurisdiction to review any attempt by the Secretary to revoke any of the so-called agreements entered into, as in this case. If this document is to have any other force and effect as showing there was a revocation, then we object. We have no objection to its admission for the purpose of showing that the Commissioner and the Secretary, or either of them, has instituted this proceeding for the purpose of setting aside the closing agreement. If his offer will be so qualified, we will withdraw our objection.

482 Mr. LEMING. Well, if your Honor please, I can not qualify what the Secretary of the Treasury does. He orders the revocation. Now, the legal effect of that, or what the Board thinks of that, is another matter. Here is what the Secretary did, and this document is offered for the purpose of showing what he did.

The MEMBER. The objection will be overruled, and it will be admitted, it being the promise of the Board to determine whether or not it is a revocation, but showing what he did.

Mr. O'HARA. We want the record to show that we are not in any way bound by that, and that is for the Board to determine.

The MEMBER. I do not think there will be any question but that that is one of the questions for the Board to determine, whether or not the closing agreement was properly revoked.

Mr. O'HARA. We make the further statement that there are certain facts set forth, and I understand his offer is qualified.

Mr. LEMING. I do not offer it for proof of the facts stated, but it is offered as proof of the action taken by the Secretary of the Treasury.

The MEMBER. The document will be admitted as Respondent's Exhibit DDDDD.

Mr. O'HARA. We note an exception.

The MEMBER. Exception noted.

(The document referred to was received in evidence and marked "Respondent's Exhibit DDDDD," and made a part of this record.)

Mr. LEMING. I will call Mr. Scanlon.

Thereupon IRWIN T. SCANLON was called as a witness by and on behalf of the respondent and, having been first duly  
483 sworn, was examined and testified as follows:

Direct examination by Mr. LEMING:

Q. Mr. Scanlon, where do you reside?

A. In the city of Scranton.

Q. Did you ever live in the city of Pittston?

A. No, sir; but Scranton is nearby to the city of Pittston.



Q. Are you familiar with the general layout with the business district of Pittston?

A. Yes, sir.

Q. How long have you been familiar with it, Mr. Scanlon?

A. Twenty years.

Q. I show you a picture and will ask you to say if you recognize the picture. It is marked for identification "Respondent's Exhibit BBBBBB."

MR. GILLESPIE. We are willing to admit that this is a picture of the Liberty Bank, as counsel for the petitioner knows it, so as to avoid the necessity of proof.

MR. LEMING. And this street, as you look at the photograph, the street on the left-hand side is William Street?

MR. WHITE. Yes; and there is William.

MR. GILLESPIE. Correct. This front is North Main Street.

MR. WHITE. This is located at the corner of North Main Street and William Street.

MR. LEMING. I offer the photograph in evidence Respondent's Exhibit BBBBBB.

The MEMBER. It will be admitted.

(The document referred to was received in evidence and marked "Respondent's Exhibit BBBBBB," and made a part of this record.)

MR. LEMING. That is all, Mr. Scanlon. There is one other question I did want to ask. Maybe we can agree to it. Is the entrance to the building as shown by Respondent's Exhibit BBBBBB known as 127 Williams Street?

MR. WHITE. No.

MR. GILLESPIE. Not at all.

MR. LEMING. May I have the petition, please?

If your Honor will bear with us a moment, I think we can save a little time.

The MEMBER. Very well.

MR. LEMING. If your Honor please, we have one little matter to check, and I think I am going to close. If I could have a five or ten minute recess, I think the announcement would be favorable for a closing.

The MEMBER. We will take a recess.

(Thereupon a recess taken.)

After the recess the following proceedings were had:

By MR. LEMING:

The respondent rests.

#### *Renewal of motion*

MR. O'HARA. We also wish to renew our motion in different form perhaps than as made at the opening of the case with re-



spect to the right in the petitioner to introduce testimony as to what is the *amount* of tax, if any, provided that the Board on consideration of this proceeding should set aside an honest closing agreement, and in addition hold there was fraud in connection with the return.

I should like to have the record show that we now renew the motion, and we ask for a ruling from your Honor at this time, if and when the Board shall set aside the closing agreement, we would have the right to further hearing at which we  
485 might present testimony on the measure of the tax liability.

The MEMBER. It is the same thing in a little different language, and the order of the Board was entered setting down the case for hearing on all points, and I do not see any occasion to change the effect or substance of that order, and for that reason I will deny the motion.

Mr. O'HARA. And the record may show an exception.

The MEMBER. Exception will be noted.

*Motion for ruling of no deficiency in tax*

Mr. O'HARA. We also move at this time, your Honor, that you rule there is no deficiency in tax due from petitioner John Kehoe for the reason that the respondent has failed to sustain the burden of showing either fraud or malfeasance, or misrepresentation of fact in connection with the agreement, and for the further reason he has not sustained the burden of showing the original return for 1925 was false and fraudulent. In support of this motion we might review the record thoroughly for you, and the testimony that has been put in the record; but, we think it suffices merely to point out to your Honor, that you will not find a scintilla of evidence which shows that John Kehoe, or either or both of the petitioners received one dollar of income in the year 1925 aside from that which might have been the subject-matter of the closing agreement.

The MEMBER. That is your statement?

Mr. O'HARA. Yes, sir.

The MEMBER. Do you wish to say anything on the motion, Mr. Leming?

Mr. LEMING. If your Honor please, without an extended  
486 resume of the evidence, I wish to call attention to the fact that the amended answer in this case was and is that two-thirds of the products of that brewery were sold to persons to the respondent unknown.

Now, there is in evidence, clear evidence of the high-power beer shipments from that brewery in the year 1925—I do not know without checking all those freight shipments, your Honor; but



many hundreds of cars. That is the uncontradicted evidence, and these are the shipments that the witness Locke heard undoubtedly when he said he heard the barrels rolling.

Locke said that his books only reflected near beer. There are the prices of the beer in evidence, and it is not difficult to figure the income from that brewery.

Without going further I submit that there is ample evidence to show the understatement of the petitioner's return in a very large amount, even though you take the price of the near beer on those shipments, you will get a large understatement of tax. If you take the price of the high powered beer, you get a high understatement of tax.

The MEMBER. The motion will be taken under advisement, and will be considered and disposed of with the disposal of the case.

Mr. O'HARA. Your Honor, we feel that we are justified in our motion, and we have decided that we will stand on the record as sustaining our motion.

Before concluding, however, Mr. Gillespie would like to ask privilege of the Board to make a statement.

The MEMBER. What do you mean by standing on the 487 record as sustaining your motion?

Mr. O'HARA. We feel, your Honor, that the respondent has not sustained the burden of proving fraud either in connection with the closing agreement or the return. We have asked your Honor to rule, if the decision be that he has sustained that burden, that we have the opportunity to present further testimony, and you have denied that motion.

We have taken an exception to your Honor's action in denying it, but, in reviewing the testimony as best we can we feel that the motion you have taken under advisement means that there should be an order that there is no deficiency by reason of the respondent not sustaining the burden.

We feel that the record justifies us in that motion, and for that reason we say that we expect to rest on the record.

The MEMBER. That motion goes to the disposition of the fraud matter.

Mr. O'HARA. That is correct, your Honor.

Mr. GILLESPIE. There is nothing further. The petitioner rests.

The MEMBER. Do you have anything further, Mr. Leming?

Mr. LEMING. Just so the record will be clear, as I understand Mr. O'Hara had already stated that the petitioners were resting upon the record as made.

Mr. GILLESPIE. As to his motion.

Mr. LEMING. And this other matter, your Honor has said ought not to be part of the record.



488 The MEMBER. In order that there may be no misunderstanding in the case, as I understand the motion, it goes to the entire disposition of the case, and on that basis I have taken the motion under advisement.

Mr. GILLESPIE. That is understood.

Mr. LEMING. I should like too, in concluding, move the Board to enter an order of redetermination that the amount of the deficiency is the amount determined by the Commissioner, being inclusive of the additional tax, and the 50 percent penalty, ordinarily known as the fraud penalty.

The MEMBER. That motion will be taken under advisement and disposed of at the same time.

If there is nothing further the case will stand submitted.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned as attorneys for petitioner.

(S) LEO W. WHITE.

(S) W. H. GILLESPIE.

(S) R. M. O'HARA.

Agreed to this tenth day of August, 1938.

(S) J. P. WENCHEL,

*Chief Counsel.*

*Bureau of Internal Revenue, Counsel for Respondent.*

*Order approving statement of evidence*

Approved and ordered filed this 13th day of August, 1938.

(S) BOLAN B. TURNER,

*Member.*

489 Before United States Board of Tax Appeals

*Præcipe for record*

Filed Aug. 10, 1938

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Third Circuit, heretofore filed by John Kehoe:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.



- (a) Petition, including annexed copy of deficiency letter.
  - (b) Answer.
  - (c) Reply.
  - (d) Motion to limit the issues at the hearing.
  - (e) Order denying Motion to limit the issues.
3. Findings of fact and opinion of the Board.

4. Decision of the Board.

490 5. Petition for Review, together with notice of filing petition for review and acknowledgment of service of copy of petition for review.

6. Order of Judge J. W. Thompson of the Circuit Court of Appeals for the Third Circuit, ordering that in settling the Statement of Evidence for inclusion in the Record under Review, the United States Board of Tax Appeals need not require the Statement of Evidence to be wholly in narrative form.

7. Order and Consent as to Exhibits, signed by Judge Mari of the Circuit of Appeals for the Third Circuit.

8. Statement of Evidence.

9. Petitioner's Exhibits 1 and 2.

10. Respondent's Exhibits as follows:

A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, —, Y, Z.

AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, —, UU, VV, WW, XX, —, ZZ.

AAA, BBB, CCC, DDD, EEE, FFF, GGG, HHH, III, JJJ, KKK, LLL, MMM, NNN, OOO, —, RRR, SSS, TTT, —.

BBBB, CCC, DDD, —.

11. This praecipe.

LEO W. WHITE,  
Pittston, Pennsylvania,  
R. M. O'HARA,  
Washington, D. C.,  
W. H. GILLESPIE,  
Pittston, Pennsylvania,  
Counsel for Petitioner.

Dated August 8, 1938.

491 Service of a copy of the within Praecipe is hereby admitted this tenth day of August 1938.

J. P. WENCHEL,  
Chief Counsel, Bureau of Internal Revenue,  
Counsel for Respondent.

No counter praecipe.

J. P. WENCHEL,  
Chief Counsel.

[Clerk's certificate to foregoing transcript omitted in printing.]



IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 6709—October Term, 1938

JOHN KEHOE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

And afterwards, to wit, the 8th day of December 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis, Honorable John Biggs, Jr., and Honorable Joseph Buffington, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 27th day of June 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

Petition for Review From the United States Board of Tax Appeals

*Opinion*

Filed June 27, 1939

Before DAVIS, BIGGS, and BUFFINGTON, Circuit Judges.  
BUFFINGTON, Circuit Judge.

This is a petition to review the decision of the United States Board of Tax Appeals. The Commissioner of Internal Revenue has assessed the petitioner, John Kehoe, with a deficiency in tax for 1925 of \$208,043.36, plus a penalty of \$108,803.61. The Board of Tax Appeals confirmed the Commissioner and dismissed Kehoe's appeal.

The fact situation presents no dispute. The petitioner's income tax for 1925 is involved. Twice he paid, without apparently any protest. His first return filed March 15, 1926, showed gross income of \$27,865.61 and a net taxable income of \$19,198.33 on which a tax of \$194.56 was computed and paid. In September 1927 agents of the Commissioner made an examination and investigation of the petitioner's income for 1925. As a result he was notified of an additional tax due of \$9,563.86, based on an increase in taxable income of \$53,990.46. At this point it is significant to note there is no evidence to indicate the basis for these figures, how they were



arrived at, what was the source of income heretofore not reached or reported; nor is there evidence of the gross figures, such as receipts and disbursements or gross or net income. Moreover, the agent of the Revenue Department who made the examination was not called by the government. The petitioner, however, appeared satisfied with this additional assessment thus made which reached him October 20, 1927, and was by him paid. He also executed a waiver of appeal to the United States Board of Tax Appeals. Following this an agreement in writing under Section 1106 (b) of the Revenue Act of 1926 was executed. It was approved by the Acting Secretary of the Treasury on January 27, 1928 and became final and conclusive on both taxpayer and Commissioner under the terms of the Act.<sup>1</sup>

Several years later, however, the Commissioner notified the petitioner that his return for 1925 would be reexamined. This was followed by a letter dated February 24, 1932, determining the deficiency tax for 1925 at \$208,034.36, plus a fraud penalty of \$108,803.61, based on an alleged income of \$890,000. The appeal of Kehoe, the petitioner, to the United States Board of Tax Appeals, and the subsequent hearing developed the circumstances and facts responsible for this additional deficiency assessment.

We here note that the Board was warranted in finding that Kehoe, the petitioner, had illegally operated a brewery known as Bartels, during the year 1925, through a permit obtained by one P. F. McGowan, who now informed against Kehoe. McGowan was merely a straw-man for the illegal manipulations of Kehoe, and during the year 1925 he sold "high powered" beer, exceeding the limitation of alcoholic content, amounting to \$890,000, concealing his own identity as the real operator. Proof by railroad records was produced to show illegal activity in sales of beer not covered by the permit of P. F. McGowan.

Were the issue here involved the revocation of the permit to operate the brewery on ground of illegal activity, there could be no hesitation in saying that a case had been made out. Were the issue one of conspiracy between Kehoe and McGowan to violate the National Prohibition Act, the answer again would be that the case against them was established. But the issue here involved is altogether different. It is whether or not the closing agreement executed by the Commissioner and the taxpayer and approved by the Acting Secretary of the Treasury on January 27, 1928, was procured by fraud or malfeasance or misrepresentation of fact.

The Revenue Act of 1926, c. 27, 44 Stat. 113, provides that a closing agreement shall be "final and conclusive" in the absence of fraud.

<sup>1</sup> SEC. 1106 (b). If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment; and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employer, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.



The purpose of the statute is the commendable one of terminating disputes and settling controversy. Judge Woodrough in *Wolverine Petroleum Corporation v. Commissioner of Internal Revenue*, 75 F. (2d) 593, 595, says:

"The purpose of the statute authorizing closing agreements is to enable the taxpayer and the government finally and completely to settle all controversies in respect of the tax liability for any previous taxable period, and to protect the taxpayer against the reopening of the matter at a later date \* \* \* to facilitate the settlement of many items affecting the taxpayers' liability, the policy has been to broaden, rather than limit, the scope of these settlements."

Congress reenacted the provision of this section in subsequent revenue acts (See: 26 U. S. C. A. 1660 (b)), realizing the wisdom of allowing and encouraging final compromises and settlements. This enactment should not lightly be disregarded by the courts since it has always been the policy of the law to encourage compromises and settlements. In *Miller v. Pyrites Co.*, 71 F. (2d) 804 (certiorari denied, 55 S. Ct. 121), the court said (810):

"Compromises of disputed claims are favored by the court and when fairly entered into, are final."

*Hennessey v. Bacon*, 137 U. S. 78; *Williams v. First National Bank*, 216 U. S. 595.

The Commissioner, therefore, had the burden of proof to show that the closing agreement was entered into either through fraud, malfeasance, or misrepresentation of fact. This burden was affirmatively placed on the Commissioner by the Revenue Act of 1928, c. 852, Sec. 601; 45 Stat. 872; 26 U. S. C. A. 612, which reads:

"In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade the tax, where no hearing had been held before May 29, 1928, the burden of proof in respect of such issue shall be upon the Commissioner."

The Commissioner at the hearing on the appeal before the Tax Board assumed the burden. As stated above, the proofs showed that the taxpayer, Kehoe, was part and parcel of a scheme to evade the National Prohibition Act in 1925. He showed that Kehoe was the actual operator of the brewery and large sums of money came into his hands through the sale of high-powered beer. But how does that prove that the closing agreement was entered into through the fraud of the taxpayer, Kehoe? The Commissioner took no steps to show that when the settlement was made the income from the illegal operation of the brewery was not taken into consideration. It was clearly within the power of the Commissioner to introduce evidence of the closing agreement and the nature of the income on which the additional tax was based. The failure to produce such testimony would clearly warrant the inference that if such testimony were produced it would be unfavorable to the Commissioner. *Runkle v.*



Burnham, 153 U. S. 216; *Chicago & N. W. Ry. Co. v. Kelly*, 84 F. (2d) 569, 572; *The Marsodak*, 94 F. (2d) 339, 343. In *Mammoth Oil Co. v. U. S.*, 275 U. S. 13, Mr. Justice Butler quotes Lord Mansfield in *Blatch v. Archer* (Cowper, 63, 65):

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."

And our Supreme Court has held, 153 U. S. 216:

"The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice was expressly adopted in the case of *Clifton v. United States*, 4 How. 242."

Considering the policy of the law to favor compromises and settlements, it was incumbent on the Commissioner to show that the income from the operation of the brewery was not considered when the additional assessment was made. That an investigation of Kehoe's liability was made, is the fact. That a written, statutory settlement was made, is also the fact. It follows, therefore, that the presumption is that all his tax liability was settled. That additional tax liability of some \$53,000 was ascertained and settled, is a fact. There is no proof that other than the brewery, any other liability existed or was claimed. If this increased liability of \$53,000 was not brewery liability, what was it? Moreover, there is nothing in the record to show that the income of which McGowan informed the government in 1930 was not considered in 1927, and paid for, and closed by agreement approved by the Secretary of the Treasury in 1928. Considerable income was considered by the government in the 1927 settlement to have warranted an additional assessment of \$9,563.86 and an additional gross income of \$53,000.

The very most that can be said for the testimony produced before the Board of Tax Appeals is that it permits two inferences to be drawn: one, that income was fraudulently omitted from the deficiency assessment on which the closing agreement was based; secondly, that the income was considered at the time of the deficiency assessment and led to the figure of \$53,990.46, additional taxable income on which an additional tax of over \$9,000 was paid and closing agreement signed, executed and approved by the Secretary of the Treasury. The law is clear that if facts give equal support to each of two inconsistent inferences, judgment must go against the party that has the burden of proof. This principle is stated by Mr. Justice Sutherland in *Penna. Ry. Co. v. Chamberlain*, 288 U. S. 333 in commenting on the evidence of that case (339):

"We therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment



as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

To the same effect is *New York Life Ins. Co. v. King*, 93 F. (2d) 347, where Judge Sanborn said (353):

"\* \* \* Evidence which is equally consistent with two hypotheses, under one of which a defendant is liable, and under the other of which it is not liable, supports neither hypothesis."

*National Bank v. American Surety Co.*, 67 F. (2d) 131; *Liggett & Myers Tobacco Co. v. DeParco*, 66 F. (2d) 678; and this particularly so in tax cases where, if there is doubt, such doubt should be resolved in favor of the taxpayer. It is no answer to say that the taxpayer could have called the government agent, for the burden is on the government to establish its case before the taxpayer is called on to answer. As the proofs stood, and now stand, we are of opinion the government has not made out its case. There is no ground of proven fact to support a finding that the now alleged brewery liability was not included in the settlement, in the \$53,000 additional gross income of Kehoe. There is no proof of any other alleged liability on the part of Kehoe which led to this large addition. It will be noted that the Tax Board nowhere considered or discussed the two underlying, basic and important questions—first, what tax liability was considered and involved in the settlement made in pursuance of the revenue officer's examination. Second, on what liability, if not for the brewery, was the additional \$53,000 predicated? And lastly, and all important, the failure of the government to call its agent and show by him, if it could, that the brewery liability was not involved in the settlement.

At best, the proof of the government leaves the validity of the settlement in doubt, and where there is doubt, the law favors the taxpayer. We find no affirmative proof that at the time of the settlement, as also the closing agreement, no brewery income was disclosed, and the revenue agent who could have proven this was not called. If the government had this proof available, why was it not made? The pleadings were such as to require affirmative proof on its part. Thus the government's averment that "said brewery by reason of the fact that said John Kehoe willfully, knowingly, and deceitfully withheld any and all information from the respondent concerning the receipt of said gains, profits and income from the operation of said brewery, misled the respondent by representing that he had no other income than that allegedly reflected in the so-called agreement as to final determination," was traversed and denied under oath by Kehoe, as follows: "That at the time of the execution of said final agreement, or prior or subsequent thereto, John Kehoe willfully, knowingly, and deceitfully withheld from respondent any information concerning income alleged to have been derived by him during the year 1925 from the operation of a brewery known as P. F. McGowan Brewery."



When the government is a litigant, it stands on the same basis as any other litigant and it is clear to us that if this was a case between private persons and one party was seeking to set aside a settlement made by the parties, he could not succeed where the failure to furnish was such as in the present case. So regarding, the decree of the Tax Board is vacated.

Biggs, Circuit Judge (dissenting).

The petitioner, the taxpayer, in March 1926, filed a Federal income tax return for himself and his wife for the calendar year 1925. Upon this return he reported a total income of \$27,865.61 and net income of \$19,198.33 which he stated had been received by him from real estate operations, dividends, interest, and "election bets." Upon this return he reported a tax due to the United States in the sum of \$194.56. This sum was paid by him. It should be pointed out that upon the return referred to the petitioner did not state the nature of his business, the line of the return upon which this information was to be written being left blank by him. Thereafter an investigation was made by the Bureau of Internal Revenue and the Commissioner upon October 20, 1927, sent to the petitioner a deficiency notice showing a deficiency in tax for the calendar year 1925 in the amount of \$9,563.86. This deficiency was duly assessed and was paid by the petitioner upon November 15, 1927. A closing agreement was then entered into between the Commissioner and the petitioner and by this agreement the total liability of the petitioner for tax and interest for the year 1925 was fixed and determined. The agreement so made between the Commissioner and the petitioner was approved by the Acting Secretary of the Treasury on January 27, 1928.

Thereafter, early in June 1929, one Patrick F. McGowan informed the Bureau of Internal Revenue in respect to the operations of a brewery known as McGowan's Brewery, at Edwardsville, Pennsylvania. It appears clearly from the record before us that the taxpayer was in fact the real owner and operator of the brewery which, ostensibly manufacturing near beer, was in fact brewing and selling real beer throughout the whole of the year 1925. McGowan was the figure-head of the brewery and acted as a cover for the petitioner. The record shows instances where the petitioner, afraid that his relationship to the brewery would be discovered through his connection with McGowan, sent the latter out of town and rewarded him for silence.

McGowan and the petitioner later fell out because of the following circumstances. McGowan was indicted by the Federal grand jury in the Middle District of Pennsylvania for alleged violations of the National Prohibition Act. The petitioner, concerned lest his own status be disclosed because of the pressure of the indictment upon McGowan, promised to reward McGowan with a substantial compensation if he would go through the trial of the criminal proceedings



without disclosing his relation to the petitioner as the latter's agent. McGowan did not have to stand trial. See United States Ex rel McGowan, 25 F. (2nd) 941, overruling United States v. Mayer, 22 F. (2nd) 827. The petitioner thereupon reached the conclusion that McGowan had rendered no service to him of value and refused to give McGowan the promised compensation. McGowan became angry with the petitioner and proceeded to inform the Bureau of Internal Revenue in detail concerning the operation of the brewery and the petitioner's connection with it.

It appears that the brewery kept two sets of books. One showed its transactions in respect to near beer and the other set showed its dealings in real beer. McGowan admitted that he had defrauded and deceived the Government and had himself violated the prohibition laws. He made plain, however, that he did so upon the instructions of the petitioner. It also appears that approximately 885 carloads of real beer were shipped from the brewery over the rails of the Delaware and Lackawanna Railroad Company in the year 1925, and that the freight on these shipments amounted to over \$98,000. From the record, it appears that each carload of beer contained approximately 100 barrels of beer and that these barrels were sold generally at a price not less than \$12 a barrel. These shipments represented sales in excess of \$1,000,000.

Other witnesses corroborated the testimony of McGowan and gave pertinent evidence upon the issues presented. There remains no doubt that the petitioner was engaged in the manufacture and sale of beer upon a very large scale within the taxable period designated by the United States.

The Board of Tax Appeals in its opinion states as follows: "We have found that the petitioner, with intent to evade tax, failed to report in his return income received from the operation of the brewery and on the record it is apparent that he made no disclosure of such income at the time of executing the closing agreement, nor at any other time. While the filing of a return and the signing of a closing agreement are separate and distinct and fraud in one does not necessarily indicate fraud in the other, the same or a continuing act, that of wilfully concealing income, may be, and on the facts in this case, is a sufficient basis for finding that the return was fraudulent with intent to evade tax and further that there was a misrepresentation of a material fact in the execution of the closing agreement."

The Board in its opinion also stated, "He (the petitioner) not only failed to disclose and report in his return the income from the operation of the brewery, but has at all times denied and still denies any connection whatever with its operation."

If these findings are supported by substantial evidence and are neither capricious nor arbitrary, the decision of the Board should be affirmed by this court. In my opinion the findings of the Board are supported fully by the record and it is apparent that the petitioner



3-50  
fraudulently failed in the first instance to return his true income upon the return filed in 1926 for the calendar year 1925; that this fraud continued throughout the time of the 1927 assessment and the execution of the closing agreement, and as a matter of fact lasted throughout the hearings before the Board of Tax Appeals where the petitioner still took the position that he was not the owner and operator and the true party in interest in the brewery.

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides:

"Sec. 1106.

"(b) If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States."

That portion of Section 1106 quoted above and contained within the brackets constitutes matter added to the Revenue Laws by the enactment of Section 1312 of the Revenue Act of 1921. See 41 Stat. 1312. The purpose of the addition within the brackets is too plain to require explanation. It is sufficient to state that these words were added in order that a closing agreement might be set aside if fraud upon the part of the taxpayer existed at the time of the execution of the agreement.

In my opinion there is no doubt that the Commissioner has sustained the burden placed upon him by the Act and has shown fraud and malfeasance upon the part of the petitioner in respect to a question of fact, "\* \* \* materially affecting the determination of assessment \* \* \*" made against him.

It is fundamental that "\* \* \* Fraud is always a question of fact to be determined by the court or jury upon a careful scrutiny of the evidence before it." *Smith v. Vodges, Assignee*, 92 U. S. 183, 184. See also *Warner v. Norton*, 20 How. 448, 460; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282, 294; and *Ball v. Warrington*, 108 F. 472. In the case last cited this court said, "\* \* \* the general rule of law being that fraud is a question of fact, and when facts are disputed the jury shall decide."

The closing agreement has not been introduced in evidence. It is simply referred to in paragraph (f) of the petition. Attached to the petition as Exhibit A is the assessment of deficiency against the petitioner and his wife under which the suit at bar is brought. In



this appears an item, designated (a), which reads as follows, "Other income not reported from the operation of the P. F. McGowan Brewery of Edwardsville, Pa. (\$) 890,000." The deficiency assessment of \$9,758.42 (sic) made in 1927 also appears specifically. The appellant contends that because of the items quoted the burden of proof is upon the Commissioner to show that the closing statement did not cover the income received by the petitioner from the illegal operation of the brewery upon which the assessment is based and that if the 1927 assessment did include and the closing agreement cover any of the petitioner's income from the illegal operation of the brewery, the Commissioner has failed to sustain the burden of showing the fraud or misrepresentation by which the closing agreement may be set aside.

This position is untenable for two reasons. First, it does not appear from evidence of record in the case at bar that the tax deficiency assessed against the petitioner in November 1927 included any income from the illegal operation of the brewery. Second, even if such assessment was shown to have included income acquired by the petitioner from the illegal operation of the brewery, there is no evidence showing that the whole or any substantial part of the income of the petitioner from his illegal operations was included in the assessment or covered by the closing agreement. Seemingly the petitioner takes the position that if he disclosed any portion of his illegal income to the United States in 1927 or if he was assessed by the United States upon any portion of that illegal income in that year, he may claim the protection of the closing agreement. The success of such a contention would place a great premium upon fraud. It became the petitioner's duty to disclose his true income in 1926 when he filed his 1925 return. The duty then placed upon him remained his thereafter and required him to disclose his true income when the assessment was made and the closing agreement executed. That he did make such a disclosure or that the United States had knowledge of his true income is clearly rebutted by the evidence, which shows that the petitioner at all times refused to acknowledge his part in the illegal operation of the brewery and that the United States received knowledge of the petitioner's connection with the brewery when McGowan turned informer. For these reasons, it is my opinion that fraud and misrepresentation by the petitioner at the time of the execution of the closing agreement in respect to his true income are clearly shown.

Whatever may be my views upon this question or those of the majority of the court, this question was for the determination of the Board of Tax Appeals which upon ample and sufficient evidence has resolved it against the petitioner. The circuit courts of the United States have held unanimously that when supported by substantial evidence, findings of the Board upon questions of fact are not reviewable. *Mitchell v. Commissioner*, 89 F. (2nd) 873, 874-875,



reversed on other grounds, 303 U. S. 391; Wickham v. Commissioner, 65 F. (2nd) 527, 529, 532; Commissioner v. Hales, 76 F. (2nd) 916.

As I read the majority opinion of the court it is admitted that the evidence in the case at bar permitted the drawing of an inference by the Board that knowledge of income taxable to the petitioner was fraudulently withheld by him from the Government at the time of the execution of the closing agreement. In this connection the majority opinion states, "The very most that can be said for the testimony produced before the Board of Tax Appeals is that it permits two inferences to be drawn: One, that income was fraudulently omitted from the deficiency assessment on which the closing agreement was based; two, that the brewery income was considered at the time of the deficiency assessment and led to the figure of \$53,990.46 additional taxable income on which an additional tax of over \$9,000 was paid and closing agreement signed, executed and approved by the Secretary of the Treasury." At the very least, the foregoing is a statement by this court of a permissible inference to be drawn by the Board of Tax Appeals upon the evidence that the petitioner neglected fraudulently to disclose all his income when the closing agreement was executed. The Board found the fraud of the petitioner to be a fact.

Accordingly I am of the opinion that the decision of the Board of Tax Appeals should be affirmed and for this reason I must dissent from the majority opinion of this court.

A true Copy:

Teste: \_\_\_\_\_

*Clerk of the United States Circuit Court  
of Appeals for the Third Circuit.*

In the United States Circuit Court of Appeals for the Third Circuit

No. 6709—October Term, 1938

JOHN KEHOE, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.



On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

Philadelphia, June 27, 1939.

Per Curiam.

BUFFINGTON, *Circuit Judge.*

[Endorsements:] Order Reversing Decree. Received & Filed, June 27, 1939. William P. Rowland, Clerk.

UNITED STATES OF AMERICA,

*Eastern District of Pennsylvania, Third Judicial Circuit, Sct.:*

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of John Kehoe, Petitioner vs. Commissioner of Internal Revenue, Respondent, No. 6709, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affix the seal of the said Court, at Philadelphia, this 20th day of September in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States the one hundred and sixty-fourth.

[SEAL]

WM. P. ROWLAND,  
*Clerk of the U. S. Circuit Court  
of Appeals, Third Circuit.*







## Supreme Court of the United States

*Order allowing certiorari*

Filed November 6, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 43826. U. S. Circuit Court of Appeals, Third Circuit. Term No. 419. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. John Kehoe. Petition for a writ of certiorari and exhibit therefo. Filed September 27, 1939. Term No. 419 O. T. 1939.







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413  
No. —

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**In the Supreme Court of the United States**

OCTOBER TERM, 1939

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**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER**

*v.*

**JOHN KEHOE**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1939**

**No. —**

**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER**

**v.**

**JOHN KEHOE**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT**

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in this case on June 27, 1939.

**OPINIONS BELOW**

The opinion of the Board of Tax Appeals (R. 33-35) is reported in 34 B. T. A. 50. The majority and dissenting opinions in the Circuit Court of Appeals (R. 493-502 are reported in 105 F. (2d) 552.

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered June 27, 1939 (R. 502-503). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.



**QUESTION PRESENTED**

Whether the Circuit Court of Appeals for the Third Circuit departed from the accepted and usual course of judicial proceeding in upsetting the finding of the Board of Tax Appeals that there was fraud, malfeasance, and misrepresentation of facts by the taxpayer in entering into a closing agreement, and that such fraud, malfeasance, and misrepresentation of facts materially affected the determination of the taxpayer's income-tax liability for 1925, covered by the agreement.

**STATUTE INVOLVED**

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1003. (a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require (U. S. C., Title 26, Sec. 641).



SEC. 1106. (b) after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

#### STATEMENT

The facts as found by the Board of Tax Appeals (R. 33-35) and as disclosed by the record are as follows:

During the year 1925 the taxpayer, John Kehoe, illegally operated a brewery, known as Bartel's Brewery or McGowan's Brewery, at Edwardsville, Pennsylvania, through a permit obtained by P. F. McGowan to manufacture cereal beverages under the National Prohibition Act (R. 36-40, 90, 196). The brewery manufactured legal "near beer," which was sold locally, and illegal beer, which was



shipped by rail from Kingston, Pennsylvania (R. 38, 43, 143-144, 292-304, 335-336, 357-367, 368-370; Exhibits FFF, GGG, HHH). Approximately 885 cars of illegal beer were shipped in 1925 (a carload consisting of about 100 barrels), and sold at from \$12 to \$17 a barrel (R. 43; Exhibits FFF, GGG, HHH). Based on the minimum price, the total income derived from the illegal sales was at least \$890,000 (R. 43, 50). The brewery operated until February 28, 1927. (R. 149, 173, 262).

McGowan was employed by the taxpayer to secure the original permit for the brewery in 1924; he was thereafter paid a salary of \$200 a month by the taxpayer, and was sometimes given extra amounts (R. 36, 40-41). He performed no regular services (R. 40). He signed such leases, applications for permits, and contracts as he was requested to sign by the taxpayer, or by William F. McHugh, manager of the brewery. He was told to "keep his mouth shut" about the brewery and was sometimes sent on trips to get him away from the brewery (R. 36-41, 138-140, 166, 172-173, 255). He opened one bank account with funds provided by Kehoe. Another was opened in his name by someone else, checks being drawn thereon by McHugh (R. 37, 41-42).

The regular books of the brewery, which were kept by Charles J. Locke, did not show charges for freight on illegal beer or sales of such beer (R. 41-42). Records of these transactions were kept



in another set of books in the back office of the brewery (R. 42, 336). Locke prepared income-tax returns for McGowan for 1924, 1925, and 1926, in which he purported to return the income from the brewery (R. 42, 196). The return for 1925 showed a net loss of \$82,325.97 (R. 42). No amounts were included in these returns to reflect the sales of illegal beer (R. 42, 196-197, 335).

The taxpayer reported no income from the brewery or from the sale of any beer in his 1925 income-tax return filed March 15, 1926 (R. 43). This return, which was signed by him and purported to be a joint return of himself and his wife, disclosed a net income of \$19,198.33 and a tax liability of \$194.56 (R. 10, 18-19, 36, 43). It did not state the nature of the taxpayer's business or occupation (Exhibit LLL).<sup>1</sup> His return was prepared by his secretary from data shown by his books (R. 398-401).

After an investigation the Commissioner, on October 20, 1927, sent to the taxpayer and his wife a notice of a deficiency in the amount of \$9,563.86 (R. 43-44). The nature of the additional income of \$53,990.46 on which this deficiency was based is not disclosed by the record (R. 10, 19, 497). This deficiency was assessed and paid November 15,

<sup>1</sup> The exhibits do not appear in the printed record. They were transmitted from the Board of Tax Appeals to the court below by order of the court (R. 6, 490), and are being certified to this Court.



1927 (R. 44). Thereafter an agreement in writing was entered into between the taxpayer and the Commissioner fixing the total liability for tax and interest for the year 1925 at \$10,631.74, which represented the tax originally paid, the deficiency of \$9,563.86, and the interest due (R. 44). This agreement was approved by the Acting Secretary of the Treasury on January 27, 1928 (R. 44).

In June 1929, the Commissioner was informed of the operation of what was known as Bartel's or McGowan's Brewery, and that John Kehoe was the owner of the brewery during 1925 (R. 44, 176-177; Exhibit 1). The informers were McGowan, Paul T. Jones, and George N. Murdock, who in March 1932 filed a claim for a reward for having given the "first information" which led to the detection of John Kehoe for violation of internal revenue laws (R. 176-177, 204, 216-230, 393-395; Exhibit 1). The nature of the information given by the informers is indicated by Exhibit 1.

On January 3, 1930, the Commissioner notified the taxpayer in writing that it was necessary to make a further examination of his income-tax liability for 1925 (R. 44). On February 13, 1932,<sup>2</sup> the Acting Secretary of the Treasury approved a cancellation and revocation of the closing agreement and directed the Commissioner to take such further action to adjust the tax liability for the year

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<sup>2</sup> The Board's finding (R. 44) erroneously gives the date as February 13, 1933.



1925 as might be in order (R. 44; Exhibit DDDDD). On February 24, 1932, the Commissioner mailed a deficiency notice to the taxpayer and his wife, asserting a deficiency of \$208,043.36 and a fraud penalty of \$108,803.61 (R. 15-17, 35, 44). The deficiency was based on income of \$890,000 from the brewery which had not been reported (R. 16-17).

Besides finding these facts the Board in its opinion pointed out that the taxpayer had at all times denied and still denied his connection with the brewery (R. 50). The denials are made in his pleadings before the Board (R. 26-27). The pleadings also show that Kehoe was indicted for income-tax evasion on March 4, 1932, but the indictment was subsequently dismissed because it had not been returned within three years after the commission of the offense charged therein (R. 13, 23-24).

On the basis of the evidence before it, the Board found that the 1925 return was false and fraudulent, with intent to evade the tax; that the deficiency here involved was due to fraud and that there was misrepresentation by the taxpayer of material facts affecting the determination covered by the closing agreement (R. 44, 50-51). It found that Mrs. Kehoe realized no income from the brewery, and was not guilty of fraud affecting the 1925 tax, and determined that the deficiency and fraud



penalty should be assessed against Kehoe alone (R. 45).

The court below held that the Board was warranted in finding that Kehoe illegally operated the brewery, concealing his identity as operator, and that during 1925 he realized income amounting to over \$890,000, but held that the Commissioner had not sustained the burden of proving that the closing agreement was entered into through fraud, malfeasance, or misrepresentation, and reversed the Board (R. 493-498, 503).

#### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the Board's finding that there was fraud, malfeasance and misrepresentation by the taxpayer of material facts affecting the determination of the deficiency covered by the 1927 closing agreement was supported by substantial evidence.
2. In usurping the power of the Board by weighing the evidence and drawing its own inference from the facts and substituting its inference for the Board's ultimate finding of fact.
3. In holding that fraud, malfeasance, and misrepresentation by the taxpayer in the execution of the closing agreement could not be proved except by direct testimony that no income from the brewery was included in the additional income on which the deficiency covered by the closing agreement was based.



4. In holding that because there was no direct testimony as to whether or not any brewery income was included in computing the deficiency on which the 1927 closing agreement was based, the Board was obliged to draw the inference that such income was included and that there was no fraud, malfeasance, or misrepresentation in the closing agreement.

5. In disregarding evidence establishing continuous actual concealment by the taxpayer of his connection with the brewery until after the closing agreement was signed.

6. In disregarding evidence establishing that the Government did not know of Kehoe's connection with the brewery until McGowan's disclosures in 1929.

7. In reversing a finding of fact of the Board where it does not appear that the evidence with every reasonable inference that may be drawn therefrom in the petitioner's favor, is insufficient to sustain it.

8. In reversing the Board's order redetermining a deficiency of \$208,043.36 and a fraud penalty of \$108,803.61.

#### REASONS FOR GRANTING THE WRIT.

This case presents simply a question of fact: Whether there was fraud or malfeasance or misrepresentation of fact affecting the determination of the tax covered by the 1927 closing agreement.



The Board found that there was such fraud, malfeasance, and misrepresentation; the majority of the court below, composed of Judges Davis and Buffington, rejected that finding, Judge Biggs dissenting. With full recognition of the proper reluctance of this Court to grant certiorari to review questions of fact, we nevertheless feel obliged to ask review of the decision below. We believe the decision to be a flagrant miscarriage of justice, and that in its review of the Board's decision the court below has so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's powers of supervision.

Specifically, the court below ignored substantial evidence supporting the Board's findings of fact that there was fraud, malfeasance, and misrepresentation affecting the tax covered by the closing agreement. It usurped the jurisdiction given to the Board by weighing the evidence and substituting its own finding for that of the Board. Section 1003 (b), Revenue Act of 1926, *supra*; *Palmer v. Commissioner*, 302 U. S. 63; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282; *Colorado Bank v. Commissioner*, 305 U. S. 23; *Hulburd v. Commissioner*, 296 U. S. 300; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Helvering v. Rankin*, 295 U. S. 123. Even if upon a complete examination of all material evidence it had found that conflicting inferences might have been drawn, it would have had no power to reverse the Board. *Palmer v. Com-*



*missioner, supra; Elmhurst Cemetery Co. v. Commissioner, supra.*

The court's error is the more serious in this case because the evidence so clearly supports the Board's finding that at the time the closing agreement was entered into the taxpayer concealed from the Bureau of Internal Revenue the fact that he was connected with the brewery. The following constitutes substantial evidence of continuous actual concealment of this fact from the time the return was filed until McGowan's disclosures in 1929 and Kehoe's attempted concealment before the Board:

1. There was concealment at the time the 1925 return was filed (R. 43, 50; Exhibit LLL).

2. The brewery was operated in McGowan's name from February 1924 to February 28, 1927, and he reported income from it in his returns as owner (R. 40, 42, 143, 173, 262).

3. The illegal operations were kept secret (R. 40-42, 166, 172, 208-211, 336).

4. The taxpayer was afraid that his connection with the brewery might become known and paid McGowan to keep silent about his connection with it (R. 40, 139-141, 166, 211).

5. In the latter part of 1926 McGowan was paid \$500 when Kehoe planned to obtain a new permit in the name of John Carroll, and when that plan failed McGowan, in February 1927, was instructed to turn over the beer to the National Prohibition



Department, and did so in his own name (R. 39-40, 173).

6. On the Friday before April 19, 1928, when the court below decided *United States v. Glass*, 25 F. (2d) 941, holding that McGowan, McHugh, and others connected with the brewery could not be removed to the Northern District of Ohio to stand trial on an indictment charging them with conspiracy to violate the National Prohibition Act,<sup>3</sup> McGowan was told by Kehoe that if he was returned to Cleveland he must go to jail but that he would be paid \$60,000 or \$70,000 (R. 166-167, 208-211, 221-222).

7. Kehoe was not indicted with McGowan and McHugh.

8. McGowan's break with Kehoe occurred when Kehoe refused to pay him after the court below handed down its 1928 decision (R. 222), and it was not until June 1929 that he and his associates informed the Government of Kehoe's activities (R. 44, 176-177; Exhibit 1).

9. McGowan and his associates filed a claim for a reward for having given the first information leading to the determination of the deficiency here involved (Exhibit 1).

10. In his reply to the Commissioner's answer in this case, Kehoe still denied all connection with the brewery, and whether or not he was its owner and

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<sup>3</sup> McGowan was indicted and arrested in 1927 but was released on bail (R. 153-156).



operator was one of the principal issues before the Board (R. 26-28, 46-47, 50).

11. The additional income on which the deficiency covered by the closing agreement was based was about \$53,000, whereas the net income derived from illegal operations of the brewery was \$890,000, and McGowan in his 1925 income-tax return had reported a loss on its legal operations (R. 10, 19, 42; 179-180).

The court below apparently disregarded all of this evidence. It assumed that the only manner in which the Commissioner could prove fraud, malfeasance, or misrepresentation was by direct testimony that no income from the brewery was included in computing the deficiency on which the closing agreement was based. It held that since there was no direct testimony on that point the Board could have drawn either the inference that it was included or the inference that it was not included; that the Commissioner had the burden of proof as to fraud and hence that the Board should have decided for the taxpayer.

As Judge Biggs pointed out in his dissenting opinion the evidence did not show that the deficiency on which the closing agreement was based included any income from the brewery, and even if it were disclosed that some of the brewery income was included, there was no showing that the whole or any substantial part of such income was included.



Plainly, in any event, Kehoe must have concealed the receipt of all but \$53,000 of the \$890,000 brewery income. And as Judge Biggs further stated, the fact that the evidence clearly indicated that the United States first received knowledge of Kehoe's connection with the brewery when McGowan turned informer (in 1929) and that Kehoe continuously refused to acknowledge that connection, negatives any assertion that he disclosed his income from this source to the Government in 1927. The disregard of such evidence by the majority of the court, or the assumption that it was not material, appears to be merely a rationalization of the decision, which, in fact, resulted from its weighing the evidence and reaching its own conclusion on the facts.

There was no justification for the court's assumption that fraud, malfeasance, and misrepresentation could be proved in only one way. Fraud can be established by circumstantial evidence (*Mammoth Oil Co. v. United States*, 275 U. S. 13, 36; *Wood v. United States*, 16 Pet. 342; *Castle v. Bullard*, 23 How. 172), and concealment constitutes fraud or misrepresentation when one is under a duty to speak (*Stewart v. Wyoming Rancho Co.*, 128 U. S. 383; *Tyler v. Savage*, 143 U. S. 79, 98). The taxpayer had filed a false and fraudulent return disclosing no income from the brewery. His connection with it and its illegal operations were concealed by many devices, not only from the Government but from the general public. He knew



when the closing agreement was signed that he had realized income from this source and that such income had not been reported in his return. The fact that concealment by the same devices previously employed continued until long after the 1927 closing agreement, that he made payments to McGowan after 1927 to insure his continued silence, and that he denied any connection with the brewery as late as 1934, obviously constitutes persuasive evidence that there was no disclosure in 1927. The weight to be given such evidence was a matter for the Board's determination.

The suggestion in the opinion that the Board's findings in fraud cases do not have the same weight as in other cases is wholly unsupported. It is true that the burden of proof is upon the Commissioner in such cases. But that fact in no way affects the conclusiveness of the Board's findings of fact in such cases, if its findings are supported by substantial evidence. *Helvering v. Nat. Grocery Co.*, *supra*; *Mitchell v. Commissioner*, 89 F. (2d) 873 (C. C. A. 2d), reversed on other grounds, 303 U. S. 391; *Wickham v. Commissioner*, 65 F. (d) 527 (C. C. A. 8th); *Commissioner v. Hales*, 76 F. (2d) 916 (C. C. A. 7th); *Goldberg v. Commissioner*, 100 F. (2d) 601 (C. C. A. 7th), certiorari denied, April 24, 1939; *Schallman and Geller v. Commissioner*, 102 F. (2d) 1013 (C. C. A. 6th). See also *Commissioner v. Ingram*, 87 F. (2d) 915 (C. C. A. 3d).



**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

**ROBERT H. JACKSON,**  
*Solicitor General.*

**SEPTEMBER 1939.**



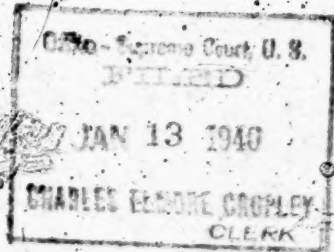








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No. 419

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**In the Supreme Court of the United States**

OCTOBER TERM, 1939

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JOHN KEHOE

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

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## OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 18-32) is reported in 34 B. T. A. 59. The majority and dissenting opinions in the Circuit Court of Appeals (R. 313-322) are reported in 105 F. (2d) 552.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1939 (R. 322-323). The petition for a writ of certiorari was filed September 27, 1939, and was granted November 6, 1939. The



jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925:

#### QUESTION PRESENTED

Whether the court below erred in upsetting the finding of the Board of Tax Appeals that there was fraud, malfeasance, and misrepresentation of facts by the taxpayer in entering into a closing agreement, and that such fraud, malfeasance, and misrepresentation of facts materially affected the determination of the taxpayer's income tax liability for 1925, covered by the agreement.

#### STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1003. (a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. [U. S. C., Title 26, Sec. 641.]



## SEC. 1106. \* \* \*

(b) If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

## STATEMENT

The facts, as found by the Board of Tax Appeals (R. 20-25) and as disclosed by the record,<sup>1</sup> may be summarized as follows:

During the taxable year 1925 the taxpayer, John Kehoe, operated a brewery, known as Bartel's

The evidence consists of testimony (R. 50-312) and certain exhibits (R. 41, 312). The exhibits are not set out in the printed record. They were transmitted physically from the Board of Tax Appeals to the court below pursuant to the order of the court below (R. 41, 312) and have been certified to this Court in their original form.



Brewery or McGowan's Brewery, at Edwardsville, Pennsylvania, which was licensed in the name of one P. F. McGowan to manufacture cereal beverages under the National Prohibition Act (R. 20-22, 51, 52, 64-67; Exhibits I, J, K, L). The brewery manufactured legal "near beer," which was sold locally, and illegal "high powered" beer, which was shipped by rail from Kingston, Pennsylvania (R. 21, 24, 86-87, 185-192, 212-213, 227-236; Exhibits FFF, GGG, HHH). Approximately 885 carloads of illegal beer were so shipped in 1925 (a carload consisting of about 100 barrels), and sold at prices ranging from \$12 to \$17 per barrel (R. 24, 28, 294-295; Exhibits FFF, GGG, HHH; see R. 186-187, 190). Based on the minimum price, the total income derived from the illegal sales (after deducting \$98,648.60 freight paid) was at least \$890,000 (R. 24, 28). The brewery was operated by the taxpayer through an arrangement with McGowan from February 1924 until February 28, 1927 (R. 21, 86, 90, 91-92, 106-107, 165-166).

McGowan was employed by the taxpayer in February 1924, to act as lessee of the brewery and to secure permits for its operation (R. 20-22, 51, 63-65, 104-106). He was advised by the taxpayer to follow the instructions given by William F. McHugh, manager of the brewery, who would in turn receive his instructions from the taxpayer (R. 20, 23, 51-52, 236-237). He signed thereafter such leases, applications for permits,



and contracts as he was requested to sign by the taxpayer or by McHugh (R. 20-23, 63-65, 72-73, 76-79, 80-81, 160-162). He performed no regular services (R. 22, 84, 216). He was told by the taxpayer to "keep [his] mouth shut" concerning the brewery and at times was sent on trips, at the expense of the taxpayer, to get him away from the brewery (R. 20-23, 83-86, 101, 106, 170-171). The taxpayer paid McGowan \$150 per month at first and \$200 per month after the first permit was issued, and from time to time gave him additional amounts (R. 23, 81-84, 169-171).

In connection with the original permit and the renewal permits obtained in the name of McGowan, the taxpayer and his brother, Tom Kehoe, executed an indemnity agreement and later a joint note in the amount of \$25,000 for the protection of a surety company which issued the indemnity bond required by the Prohibition Administration (R. 21-22, 193-195, 198-200, 177-178, 279-280, 283-285, 287; Exhibits P, VV, TTT). McGowan opened one bank account with funds supplied by the taxpayer (R. 20, 63). Another was opened in McGowan's name but without his knowledge by someone else, and checks were drawn upon it by Charles J. Locke, the bookkeeper of the brewery, and signed by McHugh (R. 23, 113-116, 121-123, 124-126). McGowan had no financial interest in the brewery (R. 22, 81). The real party in interest was the taxpayer (R. 22).



The regular books of the brewery, which were kept by Charles J. Locke, did not show charges for freight on the illegal beer or receipts from sales of such beer (R. 23, 212-213, 216-217, 219; Exhibits BBB, CCC, DDD, EEE). Records of these transactions were kept in another set of books in the back office of the brewery (R. 24, 213-214). From the records relating to the "near beer" business, Locke prepared income-tax returns for McGowan for the years 1924, 1925, and 1926, in which he purported to return the income from the brewery (R. 23-24, 110-111, 121-122, 212-213). The return for 1925 showed a net loss of \$82,325.97 (R. 24; Exhibit FF). No amounts were included in these returns to reflect the sales of illegal "high powered" beer (R. 24, 121-122, 212-213).

The taxpayer reported no income from the brewery or from the sale of any beer in his 1925 income-tax return filed March 15, 1926 (R. 24; Exhibit LLL). This return, which was signed by him and purported to be a joint return of himself and his wife,<sup>2</sup> disclosed a net income of \$19,198.33 and a tax liability of \$194.56 (R. 5-6, 10-11, 15, 20, 24; Exhibit LLL). It did not state the nature of the taxpayer's business or occupation (Exhibit LLL). His return was prepared by his secretary from data shown by his books (R. 254-256).

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<sup>2</sup>She was a party to the petition for a redetermination of the deficiency, and the Board decided that as to her there was no deficiency (R. 4-9, 31).



After an investigation the Commissioner, on October 20, 1927, sent to the taxpayer and his wife a notice of a deficiency in the amount of \$9,563.86 (R. 6, 10-11, 24-25). The nature of the additional income of \$53,990.46 on which this deficiency was based is not disclosed by the record (R. 5-6, 10-11, 317). This deficiency was assessed and paid November 15, 1927 (R. 6, 10-11, 24). Thereafter an agreement in writing was entered into between the taxpayer and the Commissioner fixing the total liability for tax and interest for the year 1925 at \$10,631.74, which represented the tax originally paid, the deficiency of \$9,563.86, and the interest due (R. 6, 10-11, 24-25). This agreement was approved by the Acting Secretary of the Treasury on January 27, 1928 (R. 6-7, 11, 25).

In June 1929 the Commissioner was informed of the operation of what was known as Bartel's or McGowan's Brewery, and that John Kehoe was the owner of the brewery during 1925 (R. 25, 108-109; Exhibit 1). The informers were McGowan, Paul T. Jones, and George N. Murdock, who in March 1932 filed a claim for a reward for having given the "first information" which led to the detection of John Kehoe for violation of internal revenue laws (R. 108-109, 135-144, 250-252; Exhibit 1). The nature of the information given by the informers is indicated by Exhibit 1.

On January 3, 1930, the Commissioner notified the taxpayer in writing that it was necessary to



make a further examination of his income-tax liability for 1925 (R. 25, 305-306; Exhibit CCCCC). On February 13, 1932,<sup>3</sup> the Acting Secretary of the Treasury approved a cancelation and revocation of the closing agreement and directed the Commissioner to take such further action to adjust the tax liability for the year 1925 as might be in order (R. 25, 306-307; Exhibit DDDDD). On February 24, 1932, the Commissioner mailed a deficiency notice to the taxpayer and his wife, asserting a deficiency of \$208,043.36 and a fraud penalty of \$108,803.61 (R. 4, 8-9, 10, 19, 25). The deficiency was based on income of \$890,000 from the brewery which had not been reported (R. 9, 29).

Besides finding these facts, the Board in its opinion concluded that "large amounts of income were received in cash by or for the [taxpayer] from the operation of the brewery in 1925, and that the receipt of this income has never been reported nor disclosed by him" (R. 28). It also pointed out that the taxpayer "has at all times denied and still denies any connection whatever with its operation" (R. 26, 28). The denials are made in his pleadings before the Board (R. 15-16), in which the taxpayer and his wife "deny that petitioner John Kehoe derived any income from that source [the operation of the brewery] during the calendar year 1925" (R. 15) and in addition "deny that petitioner John Kehoe derived income in the year 1925 from the

<sup>3</sup> The Board's finding (R. 25) erroneously gives the date as February 13, 1933, but see R. 306; Exhibit DDDDD.



operation of the P. F. McGowan Brewery of Edwardsville, Pennsylvania, either in the amount of \$890,000.00 or in any other amount" (R. 16). The pleadings also show that Kehoe was indicted for income-tax evasion on March 4, 1932, and that the indictment was subsequently dismissed because it had not been returned within three years after the commission of the offense charged (R. 7, 13-14, 15).

On the basis of the evidence before it, the Board found that the 1925 return was false and fraudulent, with intent to evade the tax; that the deficiency there involved was due to fraud with intent to evade the tax; and that there was misrepresentation by the taxpayer of material facts affecting the determination and assessment covered by the closing agreement (R. 25, 28-29). The Board in its opinion also adverted to the evidence clearly indicating the receipt by the taxpayer of amounts much greater than those upon which the deficiency was computed (R. 30) and, since no deductions were proved by the taxpayer, sustained the deficiency determined against the taxpayer by the Commissioner (R. 29-30, 32). It likewise sustained the penalty determined by the Commissioner (R. 30, 32). It found that Mrs. Kehoe realized no income from the brewery, and was not guilty of fraud affecting the 1925 tax, and determined that the deficiency and fraud penalty should be assessed against Kehoe alone (R. 25, 31, 32).

The court below held that the Board was warranted in finding that Kehoe illegally operated the



brewery, concealing his identity, and that during the taxable year 1925 he realized income amounting to over \$890,000 from that source, but held that the Commissioner had not sustained the burden of proving that the closing agreement was entered into through fraud, malfeasance, or misrepresentation, and reversed the Board (R. 313-318, 323).

#### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the Board's finding that there was fraud, malfeasance, and misrepresentation by the taxpayer of material facts affecting the determination of the deficiency covered by the 1927 closing agreement was supported by substantial evidence.

2. In usurping the power of the Board by weighing the evidence and drawing its own inference from the facts and substituting its inference for the Board's ultimate finding of fact.

3. In holding that fraud, malfeasance, and misrepresentation by the taxpayer in the execution of the closing agreement could not be proved except by direct testimony that no income from the brewery was included in the additional income on which the deficiency covered by the closing agreement was based.

4. In holding that because there was no direct testimony as to whether or not any brewery income was included in computing the deficiency on which the 1927 closing agreement was based, the



Board was obliged to draw the inference that such income was included and that there was no fraud, malfeasance, or misrepresentation in the closing agreement.

5. In disregarding evidence establishing continuous actual concealment by the taxpayer of his connection with the brewery until after the closing agreement was signed.

6. In disregarding evidence establishing that the Government did not know of Kehoe's connection with the brewery until McGowan's disclosures in 1929.

7. In reversing a finding of fact of the Board where it does not appear that the evidence, with every reasonable inference that may be drawn therefrom in the petitioner's favor, is insufficient to sustain it.

8. In reversing the Board's order redetermining a deficiency of \$208,043.36 and a fraud penalty of \$108,803.61.

#### ARGUMENT

THE COURT BELOW ERRED IN UPSETTING THE FINDING OF THE BOARD THAT THERE WAS FRAUD, MALFEASANCE, AND MISREPRESENTATION OF FACTS BY THE TAXPAYER IN ENTERING INTO A CLOSING AGREEMENT WHICH MATERIALLY AFFECTED THE DETERMINATION OF HIS INCOME-TAX LIABILITY FOR 1925, COVERED BY THE AGREEMENT

This case turns simply upon a question of fact: Whether there was fraud or malfeasance or misrepresentation of fact materially affecting the de-



termination or assessment of the tax covered by the 1927 closing agreement (Section 1106 (b), *supra*, p. 3).<sup>4</sup>

In entering into a closing agreement, the taxpayer has a duty to disclose fairly and honestly his entire income from all sources. A closing agreement is authorized by Section 1106 (b) only after a determination and assessment has been settled by the payment in full of any tax found to be due. The agreement is the culmination of negotiations between the taxpayer and his Government and at some time during those negotiations the Government is entitled to have from the taxpayer a full statement of his income producing operations. If he has fully disclosed them on his return, there is no additional duty to disclose them again. But where, as here, there has been no prior disclosure, the Government is entitled to the facts before the agreement is signed. The taxpayer does not deny that such a duty rested on him. He merely contends that the Government failed to prove that it had no such knowledge at the time of the closing agreement in question.

1. THE BOARD OF TAX APPEALS MADE FINDINGS OF FACT WHICH, IF SUPPORTED BY SUBSTANTIAL EVIDENCE, WERE CONCLUSIVE ON THE COURT BELOW

The pleadings of the parties before the Board of Tax Appeals raised the issue whether there was

<sup>4</sup> The finding of the Board (R. 25-26, 28) that the 1927 return was false and fraudulent with intent to evade tax and that the deficiency here involved could be assessed at any time under Section 278-(a), does not appear to be challenged.



fraud or malfeasance or misrepresentation of fact materially affecting the determination of the tax covered by the 1927 closing agreement.<sup>5</sup> The Board on the evidence adduced before it decided this issue against the taxpayer. Specifically, the Board found as a fact (R. 25) that the taxpayer's 1925 return was false and fraudulent, with intent to evade tax; that the deficiency here involved was due to fraud with intent to evade tax; and that there was misrepresentation by the taxpayer of material facts affecting the determination and assessment covered by the closing agreement. These conclusions of fact were more fully stated by the Board in its opinion as follows (R. 29): "

We further hold that the facts disclosed definitely show fraud, malfeasance, and mis-

<sup>5</sup> The taxpayer, in his appeal to the Board, raised, among other questions, the issue whether the Commissioner, with the approval of the Secretary of the Treasury, was justified in setting aside the closing agreement executed on December 27, 1927, and January 25, 1928 (R. 5, 8). The Commissioner in his answer alleged that the taxpayer had withheld information concerning the operation of the brewery and that the agreement had been revoked because induced by fraud, deceit, malfeasance, and misrepresentation of facts materially affecting the subject matter of the agreement (R. 10-14). The taxpayer first specifically denied these allegations in his reply (R. 15) and then further denied that he had received income from the operation of the brewery "either in the amount of \$890,000 or in any other amount" (R. 16).

<sup>6</sup> Conclusions of fact appearing in the course of the Board's "opinion" have the full force and effect of findings of fact. *Flynn v. Commissioner*, 77 F. (2d) 180 (C. C. A.



representation of facts materially affecting the determination and assessment of the tax covered by the final closing agreement and that the respondent, acting with the approval of the Secretary of the Treasury, was justified in going behind the said closing agreement in making the determination which forms the basis of this proceeding.

\* \* \* We have found that the petitioner, with intent to evade tax, failed to report in his return income received from the operation of the brewery and on the record it is apparent that he made no disclosure of such income at the time of executing the closing agreement, nor at any other time. While the filing of a return and the signing of a closing agreement are separate and distinct and fraud in one does not necessarily indicate fraud in the other, the same or a continuing act, that of wilfully concealing income, may be, and on the facts of this case, is a sufficient basis for finding that the return was fraudulent with intent to evade tax and further that there was a misrepresentation of a material fact in the execution of the closing agreement.

It is settled that "Fraud is always a question of fact to be determined by the court or jury upon a

5th); *Keck Inv. Co. v. Commissioner*, 77 F. (2d) 244 (C. C. A. 9th), certiorari denied, 296 U. S. 633; *Insurance & Title Guarantee Co. v. Commissioner*, 36 F. (2d) 842 (C. C. A. 2d), certiorari denied, 281 U. S. 748; *Olson v. Commissioner*, 67 F. (2d) 726 (C. C. A. 7th), certiorari denied, 292 U. S. 637.



careful scrutiny of the evidence before it." *Smith v. Vodges, Assignee*, 92 U. S. 183, 184; also *Laidlaw v. Organ*, 2 Wheat. 178, 194; *Warner v. Norton*, 20 How. 448, 460; *Ball v. Warrington*, 108 Fed. 472, 475 (C. C. A. 3d). The trier of the facts likewise determines the issue whether assets have been fraudulently concealed. *Dean v. United States*, 51 F. (2d) 481, 483 (C. C. A. 9th); *Kern v. United States*, 169 Fed. 617 (C. C. A. 6th). Compare *Tyler v. Savage*, 143 U. S. 79, 98; *Stewart v. Wyoming Ranch Co.*, 128 U. S. 383. The existence of fraud, concealment, or bad faith is peculiarly within the province of the trier of the facts to determine. It is often ascertainable only from a great variety of circumstances, none of which is conclusive. See *Mammoth Oil Co. v. United States*, 275 U. S. 13, 36; *Wood v. United States*, 16 Pet. 342, 360-361; *Castle v. Bullard*, 23 How. 172, 187. Such findings of fact have been declared by this Court to be binding on appeal. *Clark v. United States*, 131 U. S. (Appendix LXXXV, LXXXVI), 18 L. Ed. 915. We submit that these settled principles are at least equally applicable to findings of fraud and misrepresentation by the Board (Section 1003 (b), *supra*, p. 2). *Mitchell v. Commissioner*, 89 F. (2d) 873, 874-875 (C. C. A. 2d), reversed on other grounds, 303 U. S. 391; *Wickham v. Commissioner*, 65 F. (2d) 527, 529, 532 (C. C. A. 8th); *Commissioner v. Hales*, 76 F. (2d) 916 (C. C. A. 7th). Compare *Helvering v. National Grocery Co.*, 304 U. S. 282,



294. The sole issue within the competence of the court below to determine, therefore, was whether there was any substantial evidence to support the findings and decision of the Board. See *Helvering v. Lazarus & Co.*, No. 56, this Term; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37, 40.

2. THE EVIDENCE AMPLY SUPPORTS THE FINDINGS OF FACT OF THE BOARD OF TAX APPEALS

The court below (composed of Judges Davis and Buffington, with Judge Biggs dissenting) upset the Board's findings of fact and held that the Commissioner had not sustained the burden of proving that the closing agreement was entered into through fraud or malfeasance or misrepresentation of fact (R. 493-498). In so doing the court ignored substantial evidence in the record and usurped the jurisdiction given to the Board by weighing the evidence and substituting its own findings for those of the Board. Section 1003 (b), *supra*, p. 2; *Helvering v. Lazarus & Co.*, No. 56, this Term; *Palmer v. Commissioner*, 302 U. S. 63; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37.

The evidence adduced in this case amply supports the findings of fact made by the Board. We need not review all the evidence in detail. The following constitutes substantial evidence of Kehoe's continuous actual concealment from the Bureau of Internal Revenue of his brewery income for the year 1925, from the time the 1925 return



was filed until long after the 1927 closing agreement was executed:

1. John Kehoe at the time his 1925 return was filed (on March 15, 1926) concealed his connection with the brewery (R. 24, 28-29; Exhibit LLL). He did not report income in any amount from that source or from the sale of beer and failed to fill in the blank stating the nature of his business (R. 24, 28-29, 110-111, 121-122, 212-213; Exhibit LLL).<sup>7</sup> His income was reported as derived from real-estate operations, dividends, interest, and election bets (Exhibit LLL). This return, as found by the Board, was false and fraudulent with intent to evade tax (R. 25, 28).<sup>8</sup>

2. The brewery was operated by Kehoe, the real party in interest, in the name of his employee, McGowan, from February 1924 to February 28, 1927 (R. 20-23, 51, 52, 63-66, 81-82, 86, 90, 91-92, 105-107, 165-166). McGowan, acting under instructions from Kehoe, posed as ostensible proprietor: he entered into contracts as lessee, secured permits to operate in his own name, and as owner filed returns purporting to reflect the income from

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<sup>7</sup> He likewise failed to answer this question in his 1924 return (Exhibit KKK) and in his 1926 return (Exhibit MMM), although he stated in his 1923 return that his business was "real estate and electrical business" (Exhibit JJJ).

<sup>8</sup> The fact that the return was prepared by his secretary from information furnished by Kehoe (R. 254-256) does not relieve him of the fraud, for he executed the return and took oath to its truthfulness (R. 5, 10, 15, 24); *Cooper v. United States*, 9 F. (2d) 216 (C. C. A. 8th).



the operation of the brewery (R. 22-23, 64-66, 76-77, 110-111, 121-122, 212-213).

3. The illegal operations of the brewery and Kehoe's interest in them were kept strictly secret (R. 22-24, 101, 106, 128-132, 153, 160-161, 213-214). Charles Locke, the regular bookkeeper, never saw the records of the illegal operations and never went into the brewery when "high powered" beer was being made (R. 23-24, 212-214, 221, 223-224). Even the weekly bonus paid to the employees was always distributed in cash and was not recorded in the regular books (R. 220-221). Kehoe refused to accept a check from Harry Kenny, who bought beer from him, and insisted on being paid in cash (R. 186-187). Kehoe at times used the alias "W. J. Vincent" when endorsing checks (R. 262-263; Exhibit RRR). When there was "trouble" at the brewery, Kehoe sent the ostensible owner, McGowan, away in a new roadster (R. 83-84). McGowan made several similar trips under instructions from Kehoe and at the latter's expense (R. 84-85, 169-171). On some of these occasions McGowan was followed by revenue agents (R. 170).

4. Kehoe took elaborate precautions against any disclosure of his connection with the brewery (R. 22-24, 81-85, 101, 106, 131-132). McGowan saw

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\* Kehoe, under date of May 26, 1924, wrote to his Congressman at Washington, D. C., expressing vital interest in the permit to be issued. He stated: "Treat this matter strictly confidential so far as I am concerned \* \* \*" (Exhibit 000).



Kehoe at the brewery only once during the three years of operation but held meetings with him and McHugh as frequently as three times a week at his office in Pittston, Pennsylvania, several miles away (R. 100-101, see 226-227). Kehoe instructed McGowan to talk to no one concerning the brewery and to assert, if questioned by one James McQuade, that his cousin, Con Dorian, was interested in the brewery and that the taxpayer had no connection with it (R. 101, 104-105, 106). On January 25, 1927, Kehoe urged McGowan to swear falsely that the latter was sole owner of the brewery in order that Kehoe might use the statement to answer his political enemies (R. 162; Exhibit 2). McGowan signed the false statement as requested (R. 153, 160-161, 161-163; Exhibit 2).

5. Kehoe planned to continue to operate the brewery during the year 1927 (R. 22, 90-92, 106-107). In the early part of 1927, when the brewery was about to lose its permit, Kehoe sought to obtain a new permit to operate during that year in the name of one John Carroll (R. 22, 90-92, 106-107). McGowan was paid \$500 and ordered to turn the plant over to Carroll (R. 90-91). When that plan failed, McGowan, in late February 1927, was instructed to hand over the beer to the National Prohibition Department, and did so in his own name (R. 90-91, 106-107).

6. Kehoe, concerned lest his interest in the brewery be disclosed, on occasion promised to reward McGowan with substantial amounts of money in



order to ensure his continued silence (R. 22-23, 82-84, 129-132, 138-139). Thus, when "trouble" arose in Cleveland, Kehoe agreed to pay McGowan \$60,000 to \$75,000 in the event McGowan had to take "the rap" (R. 129-131). Kehoe made a similar promise in April, 1928 (R. 138-139). On the Friday before April 19, 1928, when the court below decided *United States v. Glass*, 25 F. (2d) 941, holding that McGowan, McHugh, and others could not be removed to the Northern District of Ohio to stand trial on an indictment charging them with conspiracy to violate the National Prohibition Act,<sup>10</sup> McGowan was told by Kehoe that if he was returned to Cleveland he must go to jail, but that Kehoe would pay him \$60,000 to \$70,000 (R. 102-103, 138-139).

7. Kehoe was not indicted with McGowan and McHugh.<sup>11</sup>

<sup>10</sup> McGowan was indicted and arrested in June 1927, but was released on bail provided by a surety company. He did not put up any collateral with the surety company nor pay any premium on the bond, nor did he employ or pay the attorney who appeared at the time of his release. Upon his release, he went with the attorney to the office of Kehoe in Pittston (R. 92-95). McGowan likewise did not employ any of the attorneys who represented him in the court below in the case decided April 19, 1928 (R. 102-103).

<sup>11</sup> When the court below on April 19, 1928, decided the case of *United States v. Glass*, 25 F. (2d) 941, involving a conspiracy in connection with the unlawful operation of the brewery, Kehoe's real interest still seems to have been concealed and undisclosed. It may be noted that the indictment there involved refers to payments by check made to one W. J. Vincent, a party not indicted and apparently un-



8. McGowan's break with Kehoe occurred after Kehoe refused to pay him and after the court below handed down its decision of April 19, 1928 (R. 138-139). McGowan and his associates did not inform the Government of Kehoe's activities until June, 1929 (R. 24-25, 108-109, 138-139; Exhibit 1).

9. McGowan and his associates filed a claim in 1932 for having given the first information<sup>12</sup> leading to the determination of the deficiency here involved (R. 139-144, 250-251; Exhibit 1).

10. In his reply to the Commissioner's answer in this case, Kehoe still denied all connection with the brewery,<sup>13</sup> and the principal issue before the Board

known (25 F. (2d) at 944). W. J. Vincent was an alias sometimes used by Kehoe in endorsing checks (R. 262-263; Exhibit RRR).

<sup>12</sup> The fact that the words "first information" appear on the printed form on which the claim was filed in no way detracts from the significance of this evidence (see Br. in Opp. 3-4, 13). The claim is in fact one for having given the first information.

<sup>13</sup> This denial in the taxpayer's pleadings does not lose any of its significance on the ground that it might—but properly should not—be viewed as being addressed to another issue in the case, i. e., the issue whether the original return was false (see Br. in Opp. 16-17). In paragraph 5 (g) of the reply (R. 15) the taxpayer, meeting paragraph 5 (g) of the answer (R. 12), categorically denied that he derived any income from the brewery in 1925. Just before concluding his reply, Kehoe also denied, generally and unqualifiedly, that he derived income from the brewery in 1925, "either in the amount of \$890,000.00 or in any other amount" (R. 16). A party is bound by his pleadings, and statements made therein must be assumed against him as judicial admissions. See *Darling Shops of Tennessee v. Brack*, 95 F. (2d) 135, 141 (C. C. A. 8th), and cases there cited. It may be observed



was whether or not he was its owner and operator (R. 14-16, 26, 28). The examination of witnesses by Kehoe's counsel throughout the hearing before the Board in 1934 clearly indicated that his connection with the brewery was vigorously contested even then (see R. 26, 28), and led the Board to observe that "It is strenuously argued that the respondent has failed to show any connection between petitioner John Kehoe and the operation of the brewery business, except through the testimony of Patrick F. McGowan, whose credibility is seriously questioned" (R. 26). The Government called Kehoe to the stand to testify to his signature upon the indemnity agreement executed by himself and his brother with the American Surety Company (R. 179-185). Kehoe examined his signature but refused to swear either that it was or was not his own (R. 179-185; see R. 261-273). The evasive character of Kehoe's testimony and his reluctance to concede his execution of the instrument (showing his connection with the brewery) is evident on the record.

11. The additional income on which the deficiency covered by the closing agreement was based was about \$53,000, whereas the income derived from illegal operations of the brewery was \$890,000 (R. 5, 10, 13, 15, 24, 28).<sup>14</sup> McGowan in his 1925

that since in 1932 the taxpayer denied he had received income from the brewery *in any amount*, the inference is clear that he must not have disclosed, nor paid a tax on, any such income in 1927.

<sup>14</sup> In computing the income on which the deficiency here involved is based, the Commissioner in his letter (R. 8-9)



) income-tax return had reported a loss on its legal operations (R. 23-24, 110-111, 121-122, 212-213; Exhibit FF).

The inferences fairly to be drawn from such evidence are a matter of common sense and need not be spelled out at length. Here there was overwhelming proof that Kehoe sought to conceal his interest in the brewery, not only from the Government, but from the general public, during the entire period from 1925 until 1934: He attempted to defraud the Government by filing (in March 1926) a false income-tax return for the year 1925. He compelled McGowan to perjure himself in January 1927. He promised McGowan a huge sum in April 1928; plainly this was to ensure his continued silence. He denied receiving income in any amount from the brewery in his pleadings filed in 1932. He contested bitterly during the trial in 1934 every piece of evidence tending to establish his connection with the brewery. When the Government called him as witness he refused even to admit his own signature on the indemnity agreement executed

did not charge the taxpayer with the income of \$53,990.46 on which the additional tax had been paid in 1927, although in computing the tax due he gave him credit for the amount of the additional tax then paid, \$9,563.86. The failure to add that income in the computation is undoubtedly due to a mere oversight, but, however caused, it is an error in the taxpayer's favor. It does not mean, as has been claimed by the taxpayer (Br. in Opp. 4-5, 13-14), that the \$53,000 was embraced in the \$890,000 income from the brewery which the letter stated had not been reported, and does not lend support to the argument that the \$53,000 was income from the brewery.



with the American Surety Company. The conclusion is irresistible that Kehoe never disclosed any information to the Government about his connection with the brewery, either at the time of the closing agreement in 1927 or at any other time. Compare *N. Y. Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 598; *Commissioner v. Dyer*, 74 F. (2d) 685, 686 (C. C. A. 2d), certiorari denied, 296 U. S. 586; *Engler v. United States*, 25 F. (2d) 37, 39 (C. C. A. 8th).

The majority of the court below assumed (R. 317) that the only manner in which the Commissioner could prove fraud, malfeasance or misrepresentation was by direct testimony that no income from the brewery was included in computing the deficiency on which the closing agreement was based. There was no justification for such an assumption. It is settled that fraud can be established by circumstantial evidence (*Mammoth Oil Co. v. United States*, 275 U. S. 13, 36; *Wood v. United States*, 16 Pet. 342; *Castle v. Bullard*, 23 How. 172, 187), and that concealment constitutes fraud or misrepresentation when one is under a duty to speak (*Stewart v. Wyoming Ranch Co.*, 128 U. S. 383; *Tyler v. Savage*, 143 U. S. 79, 98).

The argument is advanced by Kehoe in slightly altered form (see Brief in Opposition, pp. 2, 8, 12-18, 20). He urges that the failure to introduce direct testimony as to the income covered by the closing agreement precluded the Board from finding that the income from the brewery was not so



covered. This is plainly a *non sequitur*. The evidence that was introduced established that Kehoe himself never disclosed to the Government the receipt of any income from the brewery. There was no basis in the record for concluding that the Government had obtained such information from any other source until after the execution of the 1927 closing agreement. The elaborate precautions taken by Kehoe to conceal his interest in the brewery militated against an assumption that the Bureau had discovered the fraud through its investigation in the summer of 1927. A claim for having given (in June 1929) the *first information* that the 1925 return was fraudulent was filed by McGowan and his associates with the Bureau in 1932. In addition, the persistent manner in which Kehoe during the trial contested his connection with the brewery was inconsistent with a claim that an accord had been reached between him and the Bureau on that issue in 1927. Kehoe's continued concealment was very substantial evidence of his fraud. See *N. Y. Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 598; *Commissioner v. Dyer*, 74 F. (2d) 685, 686 (C. C. A. 2d), certiorari denied, 296 U. S. 586; *Engler v. United States*, 25 F. (2d) 37, 39 (C. C. A. 8th). The Government clearly produced evidence that would support a finding that the determination covered by the 1927 closing agreement was materially affected by fraud and misrepresentation of facts on the part of Kehoe. Yet despite this evidence tending to estab-



lish that the closing agreement was invalid, Kehoe rested his case. He did not introduce the 1927 closing agreement itself into evidence. He did not take the stand to testify that the income from the brewery had been included in the agreement. The inference is plain: the 1927 closing agreement did not show on its face that income from the brewery was covered by it and Kehoe could not have so testified. See *Mammoth Oil Co. v. United States*, 275 U. S. 13, 52-53. On this record, surely, there can be no doubt that the Board was justified in its finding; first, that "the petitioner [Kehoe], with intent to evade tax, failed to report in his return income received from the operation of the brewery and on the record it is apparent that he made no disclosure of such income at the time of executing the closing agreement, nor at any other time" (R. 29), and second, that Kehoe's willful and continuing concealment of his income from the brewery constituted both "a sufficient basis for finding that the return was fraudulent with intent to evade tax and further that there was a misrepresentation of a material fact in the execution of the closing agreement" (R. 29). It follows that the Board correctly held that the closing agreement did not bar the determination, assessment, and collection of the tax and penalty lawfully due from Kehoe for the year 1925.<sup>15</sup>

<sup>15</sup> Kehoe cannot now challenge the amount of the deficiency. He elected to stand on the fraud issue alone (R. 30) and failed to introduce any evidence to establish his



The result would be the same, moreover, even if the record did not refute the assumption, made by the majority of the court below, that income from the brewery was included in the additional income of \$53,990.46 upon which the assessment covered by the closing agreement was based. As Judge Biggs, in his dissenting opinion, points out—

even if such assessment was shown to have included income acquired by the petitioner [Kehoe] from the illegal operation of the brewery, there is no evidence showing that the whole or any substantial part of the income of the petitioner from his illegal operations was included in the assessment or covered by the closing agreement. Seemingly the petitioner [Kehoe] takes the position that if he disclosed any portion of his illegal income to the United States in 1927 or if he was assessed by the United States upon any portion of that illegal income in that year, he may claim the protection of the closing agreement. The success of such a contention would place a great premium upon fraud (R. 321).

The position so well stated by Judge Biggs is, in our opinion, entirely sound and well supported by the record. It is manifest on this record that the *net income* Kehoe received from the operation

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right to any deduction from the income he was shown to have received. See *Helvering v. Taylor*, 293 U. S. 507, 514; *New Colonial Co. v. Helvering*, 292 U. S. 435. The evidence establishes the receipt by Kehoe of taxable income in excess of the amount (\$890,000) used as the basis for computing the deficiency here involved (R. 9, 28, 30).



of the brewery was many times the amount covered by the closing agreement.<sup>16</sup>

3. THE COURT BELOW USURPED THE JURISDICTION OF THE BOARD  
OF TAX APPEALS

The suggestion in the opinion of the majority of the court below (R. 316) that the Board's findings in fraud cases do not have the same weight as in other cases is wholly unsupported. It is true that the burden of proof in such cases is upon the Commissioner. But that fact in no way affects the conclusiveness of the Board's findings of fact where, as here, they are supported by substantial evidence. *Mitchell v. Commissioner*, 89 F. (2d) 873 (C. C. A. 2d), reversed on other grounds, 303

<sup>16</sup> Kehoe's *gross receipts* from the illegal operations of the brewery were between \$1,062,000 (figured at \$12 per barrel sold) and \$1,504,500 (figured at \$17 per barrel) (R. 28). His *expenses* for freight aggregated \$98,648.60 (R. 28). There is clear evidence that the other *expenses*, such as materials and labor, with minor exceptions, were charged against the legal operations of the "near" beer business. Thus, the legal operations were charged with expenses of over \$180,000 on a gross business of only \$97,713.19 (R. 24; Exhibit FF). McHugh's salary and that of the other employees (with the exception of an \$8-per-week cash bonus) was charged against "near" beer operations (R. 216, 221). The inventory account on the "near" beer books included beer that had not been dealcoholized (R. 43, 218). The rent of \$52,999.92 paid in 1925 was charged entirely against the legal operations (see R. 20; Exhibits FF, CCC, EEE). Plainly, the major portion of the cost of acquiring the illegal receipts was included in the expenses charged against the legal operations on the "near" beer books and taken as a deduction in the 1925 return filed by McGowan, acting as agent for Kehoe.



U. S. 391; *Wickham v. Commissioner*, 65 F. (2d) 527 (C. C. A. 8th); *Commissioner v. Hales*, 76 F. (2d) 916 (C. C. A. 7th); *Goldberg v. Commissioner*, 100 F. (2d) 601 (C. C. A. 7th), certiorari denied, 307 U. S. 622; *Schallman and Geller v. Commissioner*, 102 F. (2d) 1013 (C. C. A. 6th). See also *Commissioner v. Ingram*, 87 F. (2d) 915 (C. C. A. 3d).

It was the function of the Board to weigh the evidence, to draw the inferences from the facts established by the proof, and to choose between conflicting inferences. *Helvering v. Lazarus & Co.*, No. 56, this Term; *Helvering v. National Grocery Co.*, 304 U. S. 282; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37. The findings of fact by the Board, in our opinion, are supported by overwhelming evidence. But were the evidence less clear, the opinion of the majority of the court below would still be erroneous. The court below concluded that the evidence produced before the Board "permits two inferences to be drawn" (R. 316). It was plainly the duty of the Board, not that of the court below, to draw one rather than the other inference and to declare the result (Section 1003 (a), *supra*, p. 2). *Helvering v. Lazarus & Co.*, No. 56, this Term, p. 2.<sup>17</sup>

<sup>17</sup> The cases cited by the court below (R. 316-317), even if applicable to proceedings before the Board of Tax Appeals, are concerned with situations in which, contrary to that here, the evidence leaves the issue completely in the field of conjecture and speculation.



**CONCLUSION**

The judgment of the court below should be reversed, with direction to dismiss the respondent's petition for review or to affirm the decision of the Board.

Respectfully submitted.

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**JANUARY 1940.**











**No. 419.**

**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1939.**

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**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, Petitioner,**

**v.**

**JOHN KEHOE.**

---

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIO-  
RARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.**

---

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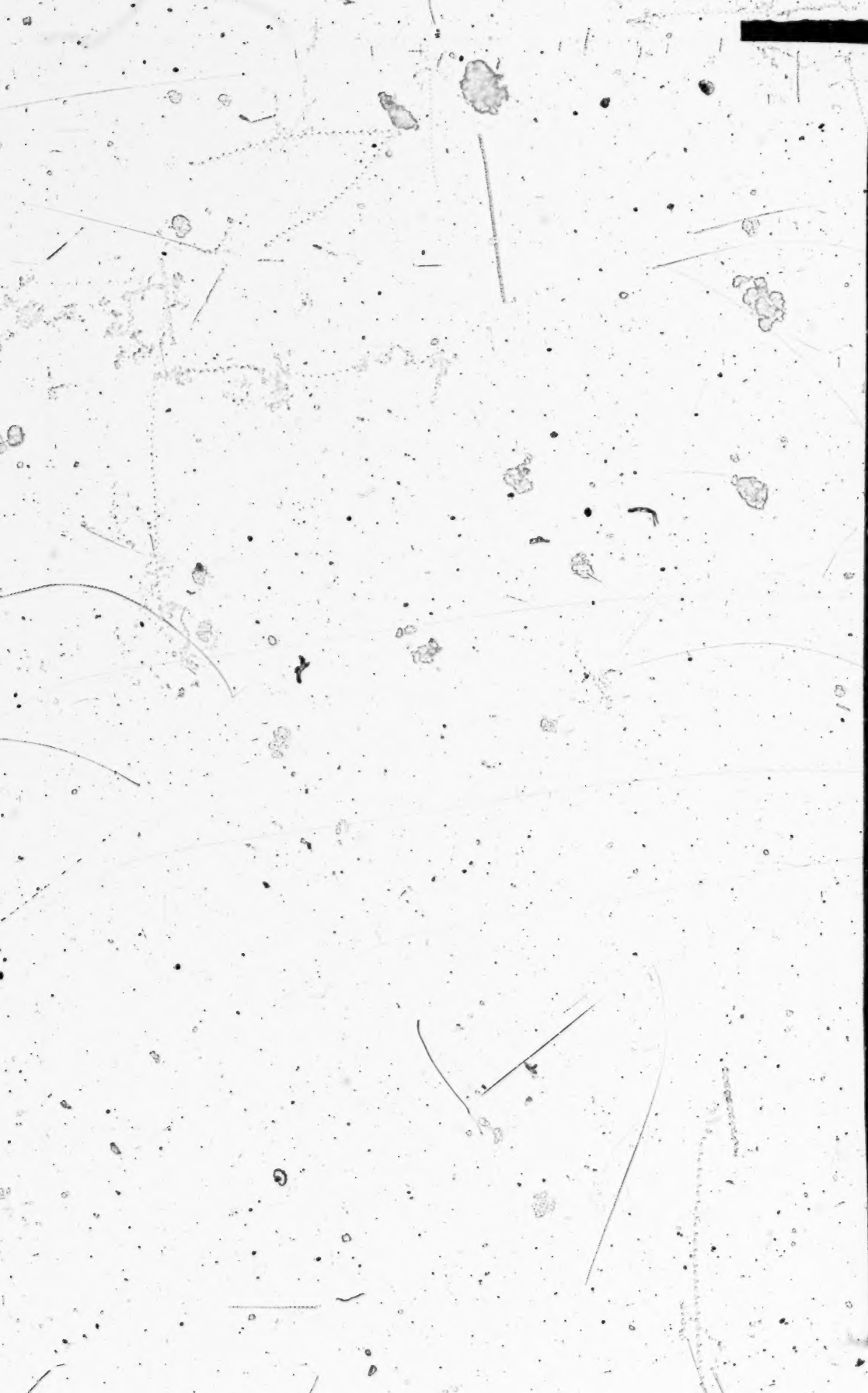
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IN THE  
Supreme Court of the United States

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OCTOBER TERM, 1939. No. 419.

---

*Guy T. Helvering, Commissioner of Internal Revenue,  
Petitioner,*

v.

*John Kehoe.*

---

**BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI.**

The respondent respectfully submits this brief in opposition to the petition for *certiorari* herein on behalf of Guy T. Helvering, Commissioner of Internal Revenue, petitioner.

---

**QUESTIONS PRESENTED.**

Where a taxpayer files his income tax return for 1925 without accounting therein for alleged taxable



income from the illegal operation of a brewery, and thereafter the Commissioner of Internal Revenue, upon the basis of an investigation and report to him by his representative, determined an additional net income of \$53,990.46, upon which tax was assessed and paid and a closing agreement entered into, and later the commissioner seeks to set aside the closing agreement on the ground that brewery income had not previously been taxed;

(1) Is the ultimate finding by the Board of Tax Appeals of fraud or malfeasance or misrepresentation of fact in the closing agreement, a conclusion of law, or at least a determination of a mixed question of law and fact, which is subject to judicial review, and upon which the Circuit Court may substitute its judgment for that of the Board; and

(2) May the Circuit Court properly hold as a matter of law, that the ultimate fact of fraud or malfeasance or misrepresentation of fact in the closing agreement, is unsupported by any substantial evidence, when the Commissioner, upon whom the statute imposed the burden of proof, called no witnesses and presented no evidence, which he could have produced, as to the nature or source of the additional income covered by the closing agreement, whether from the brewery or elsewhere, or as to how he determined same, or as to taxpayer's conduct or participation in the matters connected with the closing agreement.



## STATEMENT OF THE CASE.

Taxpayer has determined to write his own statement because the petition for *certiorari* contains misstatements, as well as statements tending to mislead this Court. Examples of such appear below.

On page 13, paragraph 11, petitioner asserts that; "The **net** income derived from illegal operations of the brewery was \$890,000." This statement does not accord with the Board's findings and is not supported by the evidence. Petitioner alleged in his deficiency notice and pleadings that the \$890,000 was gross receipts from brewery operations (R. 16, 22, 23). The Board found **gross** receipts from the operation of the brewery in excess of \$890,000 (R. 49, 50, 52). The cost of operations was not considered and nowhere is there any testimony or any finding that the \$890,000 is **net** income.

On page 15, petitioner asserts "that he [taxpayer] made payments to McGowan after 1927 to insure his continued silence", but the Court will search the record in vain for any proof thereof. No facts were found by the Board or set up in the petition which would support this statement.

On page 6, petitioner informs that the first information he had with regard to any income from the brewery was through information furnished by McGowan and others in June, 1929. The expression "first information" is found in the claim for reward executed March 29, 1932, where it appears in the matter printed by the Treasury Department on the



blank form which it furnishes for use in making claim (Exhibit 1). There is no evidence in the record showing that this was petitioner's first information of brewery income.

The taxpayer submits the following as the statement of the case.

As stated by the Circuit Court in its opinion, "The fact situation presents no dispute" (R. 493).

Taxpayer's return for 1925 filed March 15, 1926, showed gross income of \$27,865.61 and a net taxable income of \$19,198.33 on which tax was paid (Ex. LLL and R. 10, 11, 19, 20, 43). As a result of investigation and report by his agents in September, 1927, the Commissioner increased taxpayer's net taxable income to \$73,188.79, an increase of \$53,990.46 upon which taxpayer paid additional tax and interest of \$10,437.18 (R. 10, 11, 19, 43, 44). Thereafter on January 27, 1928, taxpayer and Commissioner, pursuant to Section 1106(b) of the Revenue Act of 1926, agreed in writing, approved by the Acting Secretary of the Treasury, that taxpayer's liability for 1925, as then determined, should be final and conclusive (R. 11, 12, 19, 20, 44-46).

On February 24, 1932, Commissioner notified taxpayer that the closing agreement had been set aside (R. 17) and that he had determined a deficiency in tax for 1925 of \$208,043.36, plus a 50% fraud penalty of \$108,803.61 based on income in the amount of \$890,000 from the operation of a brewery (R. 15-17). The Commissioner's statement of the deficiency (R. 16) showed that the \$890,000 embraced the addi-



*Statement of the Case.*

5

tional income of \$53,990.46 covered by the closing agreement. Taxpayer petitioned the Board of Tax Appeals for a redetermination of this deficiency (R. 8-17).

The Board found that the Commissioner had established taxpayer's connection with the brewery in 1925 and that no income therefrom had been accounted for in his original return for that year. The Commissioner had alleged in his answer to taxpayer's petition for redetermination, that one W. F. Loughran had paid \$890,000 in that year to taxpayer for cereal beverage, purchased by him from the taxpayer, but this was not proved as Loughran refused to so testify when called as a witness by Commissioner (R. 23, 462, 472). The income of \$890,000 disclosed by the evidence as found by the Board represented "gross receipts" from sales of beer (R. 50, 52).

Upon the issue made by the pleadings, whether the taxpayer had additional taxable income beyond the \$53,990.46 covered by the closing agreement (R. 20-26, 27), the Commissioner, although his agents had investigated and reported on the additional taxable income covered by the agreement, did not call his agents as witnesses, or present their report, or otherwise attempt to show the nature or source of the additional income covered by the closing agreement, whether from the brewery or elsewhere, or how he determined same before entering into that agreement, or taxpayer's conduct or participation in the matters connected with the closing agreement.



The Board concluded that the Commissioner had sustained his burden of proving fraud or malfeasance or misrepresentation of fact in the closing agreement and was justified in setting it aside (R. 44, 50).

On this issue the Circuit Court reversed the Board, saying:

"As the proofs stood, and now stand, we are of opinion the government has not made out its case. There is no ground of proven fact to support a finding that the now alleged brewery liability was not included in the settlement, in the \$53,000 additional gross income of Kehoe. There is no proof of any other alleged liability on the part of Kehoe which led to this large addition. It will be noted that the Tax Board nowhere considered or discussed the two underlying, basic and important questions—first, what tax liability was considered and involved in the settlement made in pursuance of the revenue officer's examination. Second, on what liability, if not for the brewery, was the additional \$53,000 predicated? And lastly, and all important, the failure of the government to call its agent and show by him, if it could, that the brewery liability was not involved in the settlement" (R. 497).

#### REASONS FOR REFUSING THE WRIT.

1. The court below did not usurp the jurisdiction of the Board of Tax Appeals.

Petitioner, as ground for granting the writ of *certiorari*, charges that the court below has so far



departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision. Specifically, petitioner charges that the court below ignored substantial evidence supporting the Board's finding of fact and usurped the jurisdiction of the Board by weighing the evidence and substituting its own finding for that of the Board.

This charge is unfounded. What the court below did was to determine from the record whether there was any substantial evidence to support the finding of the Board that brewery income was omitted from the closing agreement through fraud or malfeasance or misrepresentation.

Whether there was any substantial evidence to support the ultimate finding of the Board is clearly a question of law, or at least a determination of a mixed question of law and fact, which is the subject of judicial review, and on such review the court may substitute its judgment for that of the Board.

**Colorado Bank v. Commissioner, 305 U. S. 23 (1938);**

**Bogardus v. Commissioner, 302 U. S. 34, 38 (1937);**

**Helvering v. Tex-Penn Co., 300 U. S. 481 (1937).**

It is clear that the court below, in searching the record to determine whether there was substantial evidence to support the ultimate finding of the Board,



was properly exercising its jurisdiction as defined by this Court and was not usurping the functions of the Board, as charged by petitioner.

It is difficult to understand the basis of petitioner's serious charge against the court below that it abused its powers in deciding that the record lacks substantial evidence of the omission of brewery income from the closing agreement, when he now admits (petition page 5) that "The nature of the additional income of \$53,990.46 on which the deficiency was based is not disclosed by the record". It may be that the petitioner seeks thereby to distract this Court's attention from the unfavorable presumption which, by law, attends his failure to produce the direct and explicit evidence in his possession (his agent's report, for example) of the nature and source of the income on which the additional tax was assessed and paid and the case closed in 1928.

2. There was no substantial evidence to support the ultimate finding of the Board that there was fraud or malfeasance or misrepresentation of fact in the execution of the closing agreement.

The court below reversed the Board of Tax Appeals upon the issue of fraud or malfeasance or misrepresentation of fact materially affecting the determination and assessment of the tax covered by the closing agreement, and rightly so, we contend, because the Board's ultimate finding was not supported by substantial evidence.



On this issue the Commissioner, petitioner here, had the burden of proof by statute.

Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 113, See: 26 U. S. C. A. 1660(b));

Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 872, 26 U. S. C. A. 612);

Jones v. Simpson, 116 U. S. 609, 615 (1886).

What is substantial evidence upon an issue of fraud? Not inference or presumption, nor even a bare preponderance which leaves the issue in doubt, but only that which is clear, unequivocal and convincing, and, of course, the best evidence of which the nature of the case will admit.

United States v. American Bell Telephone Co., 167 U. S. 224 (1897);

Farrar v. Churchill, 135 U. S. 609 (1890);

Colorado Coal and Iron Co. v. United States, 123 U. S. 307 (1887);

Maxwell Land-Grant Case, 121 U. S. 325 (1887);

Jones v. Simpson, *supra*;

United States v. Arredondo, 6 Peters 691, 21 U. S. 689 (1832);

Griffiths v. Commissioner, 50 Fed. (2d) 782 (C. C. A. 7, 1931);

Budd v. Commissioner, 43 Fed. (2d) 509 (C. C. A. 3, 1930);

Kerbaugh v. Commissioner, 29 B. T. A. 1014 (1934).



Confronted with the closing agreement, which he had made with the taxpayer in 1928, and which, *prima facie*, finally and completely settled all controversies between them in respect of the 1925 tax liability<sup>1</sup>, the Commissioner could sustain his burden only by proving clearly and convincingly that the additional income of \$53,990.46 covered by the closing agreement, did not include respondent's taxable income from the brewery.

However, the Commissioner admits (petition, page 5) that "The nature of the additional income of \$53,990.46 on which this deficiency was based is not disclosed by the record." And why was this not disclosed? Because the Commissioner, while admitting (R. 19)

"\* \* \* that about the month of September 1927 a representative of the Bureau of Internal Revenue made an investigation of the income tax liability of said petitioners for the year 1925; \* \* \* that the report of the investigation was prepared and forwarded to respondent at Washington, D. C., on about September 19, 1927, \* \* \* that the report showed a total tax liability (inclusive of the amount shown on the aforesaid return) of \$9,758.42 for said year or an additional tax for said year of \$9,563.86; \* \* \* that in the computation of such additional tax liability the representatives of the Bureau of Internal Revenue increased the taxable income for 1925 from \$19,198.33 as shown by the aforesaid return to \$73,188.79; \* \* \*

<sup>1</sup> Wolverine Petroleum Corporation v. Commissioner, 75 Fed. (2d) 593 (C. C. A. 8, 1935).



for some reason, as yet unexplained, did not call his investigating agent as a witness, or present his report, or otherwise attempt to show the nature or source of the additional income covered by the closing agreement, whether from the brewery or elsewhere, or how he determined same before entering into that agreement, or taxpayer's conduct or participation in the matters connected with that agreement.

Logically this was the primary and best evidence of which the nature of the case would admit and it was within petitioner's power to produce it. Less satisfactory evidence is neither clear, unequivocal and convincing, nor substantial evidence "such \* \* \* as a reasonable mind might accept as adequate to support a conclusion."

**Consolidated Edison v. N. L. R. B., 305 U. S. 197, 229 (1938).**

Indeed, the absence of the primary evidence, not accounted for, raises a presumption that, if produced, would give a complexion to this case adverse to the interest of the petitioner.

**Clifton v. United States, 45 U. S. 242, 4 How. 242 (1846);**

**Runkle v. Burnham, 153 U. S. 216 (1894);**

**Caminetti v. United States, 242 U. S. 470 (1917);**

**Bilokumsky v. Tod, 263 U. S. 149 (1923);**

**Mammoth Oil Co. v. United States, 275 U. S. 13 (1927);**

**Interstate Circuit, Inc. v. United States, 306 U. S. 208 (1939).**



Nor is the petitioner here, an officer of the government, having the burden of proof, any less susceptible to the unfavorable presumption which arises from failure to produce the best evidence in his power, than the ordinary litigant.

**Lau, Hu Yuen v. United States, 85 Fed. (2d) 327 (C. C. A. 9, 1936).**

Petitioner attempts to circumvent his failure to put his witnesses on the stand to prove the nature of the income covered by the closing agreement by arguing:

(1) That the first information he received of the brewery income was from McGowan and Jones;

(2) That taxpayer concealed the brewery income after the execution of the closing agreement; and

(3) That taxpayer denied any connection with the brewery in his pleadings in this case.

(1). Petitioner's argument that, since McGowan and Jones did not come to him with detailed information about taxpayer's interest in the brewery until after the closing agreement, petitioner did not have knowledge of it until the time, is a *non sequitur*. It does not show that petitioner did not have knowledge of the source of the taxpayer's income from his own investigation in 1927 and did not base the closing agreement on income from such source.



In:

26 C. J. Sec. 75, 1163,

it is stated:

"Where the representee undertakes an independent investigation he is ordinarily chargeable with knowledge of all the facts which such an investigation should disclose, \* \* \*"

The fact that McGowan and Jones may have given the petitioner more detailed information on the brewery operation, the income from which was already known to petitioner, is insufficient ground to charge the taxpayer with fraud and misrepresentation regarding the execution of the closing agreement covering income from that source. Other proof is necessary and it was not forthcoming.

There is no evidence in this record showing that petitioner failed to disclose income received by him from the brewery at the time the closing agreement was executed. There is no evidence that the first information concerning the operations of the brewery came to petitioner subsequent to the execution of such agreement. The only mention of "first information" in the record comes from the printing on the Treasury form used in making claim for reward and this is no evidence whatsoever. (Exhibit No. 1.)

On the contrary, the deficiency notice, admittedly sent to taxpayer on February 24, 1932 (R. 15-17), shows that the alleged income from the brewery in



the sum of \$890,000 includes in it the additional income of \$53,990.46 on which the assessment of 1927, covered by the closing agreement, was based. In the deficiency notice (R. 16-17), petitioner adopts from the taxpayer's original tax return as "net income reported" the figure of \$19,198.33, adds to this as "other income not reported from operation of the P. F. McGowan Brewery of Edwardsville, Pa." the amount of \$890,000, and as "corrected net income" takes the total of these two items, \$909,198.33. This notice shows "tax previously assessed, original \$194.56" which is the tax on \$19,198.33, the net income originally reported. It also shows "tax previously assessed, additional \$9,563.86," which is the deficiency paid in 1927 on an increase in income of \$53,990.46, included in the closing agreement. Since this additional income of \$53,990.46 is not specifically and separately referred to in the notice, it must be included in the \$890,000 designated as income from the brewery. In the light of this and in the absence of any evidence to the contrary produced by the petitioner, it must be assumed that he knew, at the time he entered into the closing agreement with the taxpayer, that this additional taxable income of \$53,990.46 had come from the operation of the brewery.

The fact that the present assessment is on an additional income of \$890,000 and the assessment of 1927 was on an added income of only \$53,990.46, does not prove that this is not the same income, because the \$890,000 is gross receipts from the brewery (R. 22.



23, 50, 52) with no deductions for the costs of operation, whereas the \$53,990.46 is net taxable income, and for all that appears in this record is the net taxable income of taxpayer from his interest in the brewery.

(2). Petitioner argues that concealment by the same devices as previously employed continued until long after the 1927 closing agreement, and that taxpayer made payments to McGowan after 1927 to assure his continued silence.

The only testimony showing payments to McGowan to insure his silence, which will be found by examination of the petitioner's record references, covered occurrences before February 28, 1927, at which time McGowan's connection with the brewery ceased (R. 173). For example, the purchase of an automobile to send McGowan away on a trip, instructions to keep his mouth shut, and an injunction to deceive McQuade as to the true ownership of the brewery, all occurred prior to February 28, 1927.

With regard to taxpayer's alleged promise to pay McGowan \$60,000, or \$70,000, this was first made in 1925 (R. 210). The reason for the payment was for the "rap" McGowan thought he would have to take (R. 211) and for the investigation he had to undergo (R. 212). These promises related to occurrences in 1925. The only other testimony concerning the same sum of money was that of McGowan who testified that taxpayer, on the Friday before April 19, 1928, had promised to pay him that amount, if he



had to go to jail for violation of the National Prohibition Act (R. 221). It was to protect McGowan's wife and children and not to insure silence (R. 221). This is borne out by the fact that, when the court decided that he did not have to go to jail, taxpayer did not make the payment to him.

(3). Petitioner argues that taxpayer's denial in the pleadings that he ever received any income from the operation of the brewery in 1925 indicates that income from the brewery was not included in the closing agreement.

However, this does not follow, for the taxpayer in the pleadings also expressly refused to concede the correctness of the income forming the basis of the closing agreement (R. 10). In other words, both as to the assessment covered by the closing agreement and the present assessment, taxpayer denied that there was any additional income which he received for 1925, but in each case the petitioner thought differently. Therefore, a denial of receipt of income from the operation of the brewery does not indicate that the closing agreement did not cover such income.

Furthermore, the pleadings in this case raised two distinct issues, first, was there fraud or misrepresentation in connection with the closing agreement, and second, was the original return false and fraudulent. The facts supporting both these issues were pleaded affirmatively by petitioner in his answer and in order to frame these issues, as required by the rules of the



Board, taxpayer in his reply made appropriate denials. To meet the facts which petitioner averred supporting the issue of fraud relating to the closing agreement, the taxpayer denied that he had received any income in 1925 in addition to that covered by the closing agreement, or that any such income had been concealed from petitioner. In meeting the issue of a false return, taxpayer denied the receipt of any income from the brewery.

It is a well settled principle of evidence that a party is forbidden to resort to his adversary's pleadings on one issue in a cause to prove another issue in the same cause.

**2 Wigmore on Evidence, Sec. 1064(2).**

As stated by Mansfield, *C. J.*, in:

**Harington v. MacMorris, 5 Taunt. 228, 233 (1813):**

“\* \* \* it is every day's practice, that the defendant's language in one plea cannot be used to disprove another plea, as in the familiar instance I have given of trespass, and not guilty and a justification pleaded, where the justification would certainly, if admissible, prove the act, in case the reason of the justification fails. \* \* \*”

Moreover, the denial in the pleadings upon which petitioner bases his argument is a pleading only. It was not offered in evidence and, therefore, has no evidential value. If petitioner had offered this denial in evidence, it would have been evidence against him



on the issue whether the original return was false. Since petitioner did not take the risk of offering this adverse testimony on this issue, he should not now be allowed to use it on the other issue.

In addition, taxpayer's denial in the pleadings of any connection with the brewery is not necessarily inconsistent with the conclusion that the additional income taxed in 1927 was in fact net income from the brewery. The taxpayer might very well have consented to the taxability of the brewery income in connection with the execution of the closing agreement and still have been reluctant to admit his connection with the brewery in a formal document open to public inspection, such as the pleadings in this case. This is especially true in view of the fact that, although compelled to pay tax on his income regardless of source, he is not required to make admissions which might incriminate or degrade him.

*United States v. Sullivan*, 274 U. S. 259 (1927);  
*Steinberg v. United States*, 14 Fed. (2d) 564  
(C. C. A. 2, 1926).

The tenuous arguments of petitioner lack conviction and leave unanswered the question as to why he did not produce the best evidence in his power. This is the vital factor which cuts clearly across all else in petitioner's case. The conclusion is inescapable that such evidence (his agent's report, for example) was adverse to petitioner's own interest, or he would have used it.



As the court below so aptly stated (R. 498):

“When the government is a litigant, it stands on the same basis as any other litigant and it is clear to us that if this was a case between private persons and one party was seeking to set aside a settlement made by the parties, he could not succeed where the failure to furnish was such as in the present case.”

### CONCLUSION.

The situation which petitioner seeks to overcome may be stated as follows: “Assume that taxpayer’s original return was false and fraudulent, and that taxpayer withheld income which he should have returned. Petitioner made an independent investigation, found the additional income, taxed it, and then made a closing agreement, taxpayer having paid the additional tax.

*Prima facie*, this closing agreement is valid and was entered into with full knowledge of all relevant facts, especially those facts which an investigation such as was made should have or did disclose. Therefore, *prima facie*, the closing agreement included all taxable income not reported originally and included the net income from the brewery, which petitioner now seeks to redetermine and assess. If the facts are otherwise, the burden was on the petitioner to so prove.



The petitioner failed to meet this burden. Admittedly he produced no evidence to show his knowledge of the additional income determined in 1927 or the nature or source thereof. Although the facts disclosed by his independent investigation were known to petitioner and must have shown the nature and source of the additional income of \$53,990.46, upon which the additional tax and interest of \$10,437.18 was assessed and paid, and constituted the best available evidence on the issue, petitioner neither produced the report of the revenue agents who made the investigation, nor summoned them as witnesses.

Neither the petitioner, nor his agents testified, that at the time the final closing agreement was executed, they lacked knowledge that the taxpayer had received income from the brewery operations, or that the taxable income on which the closing agreement was based did not include net income therefrom.

In the absence of such direct and explicit evidence, which petitioner could have produced, the court below properly reversed the board and it is respectfully submitted that the petition for a writ of certiorari should be denied.

LEO W. WHITE,

R. M. O'HARA,

W. H. GILLESPIE,

ROBERT T. McCRACKEN,

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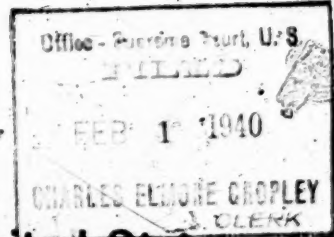
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**No. 419.**

**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1939.**



**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, Petitioner,**

**v.**

**JOHN KEHOE.**

**BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.**

**LEO W. WHITE,  
R. M. O'HARA,  
W. H. GILLESPIE,  
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IN THE  
Supreme Court of the United States

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OCTOBER TERM, 1939. No. 419.

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*Guy T. Helvering, Commissioner of Internal Revenue,*  
*Petitioner,*

v.

*John Kehoe.*

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**BRIEF FOR RESPONDENT.**

The respondent respectfully submits this brief in opposition to the brief on behalf of Guy T. Helvering, Commissioner of Internal Revenue, petitioner.

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**QUESTION PRESENTED.**

Where a taxpayer files his income tax return for 1925 without accounting therein for alleged taxable income from the illegal operation of a brewery, and thereafter the Commissioner of Internal Revenue, upon the basis of an investigation and report to him



*Statement of the Case.*

by his representative, determined an additional net income of \$53,990.46, upon which tax was assessed and paid, and a closing agreement entered into, and later the commissioner seeks to set aside the closing agreement on the ground that brewery income had not previously been taxed;

(1) Did not the Circuit Court properly hold, as a matter of law, that the finding of fact of fraud or malfeasance or misrepresentation of fact in the closing agreement, was unsupported by any substantial evidence, when the Commissioner, upon whom the statute imposed the burden of proof, presented no evidence (which was in his power to produce), as to the nature or source of the additional income covered by the closing agreement, or as to how he determined same, or as to taxpayer's conduct or participation in the matters connected with the closing agreement?

**STATEMENT OF THE CASE.**

Taxpayer's return for 1925 filed March 15, 1926, showed gross income of \$27,865.61 and a net taxable income of \$19,198.33 on which tax was paid (Ex. LLL and R. 5, 6, 10, 11, 24). As a result of investigation and report by his agents in September, 1927, the Commissioner increased taxpayer's net taxable income to \$73,188.79, an increase of \$53,990.46 upon which taxpayer paid additional tax and interest of \$10,437.18 (R. 5, 6, 10, 24, 25). Thereafter on January 27, 1928, taxpayer and Commissioner, pursuant to Section



1106(b) of the Revenue Act of 1926, agreed in writing, approved by the Acting Secretary of the Treasury, that taxpayer's liability for 1925, as then determined, should be final and conclusive (R. 6, 7, 10, 11, 24-26).

On February 24, 1932, Commissioner notified taxpayer that the closing agreement had been set aside (R. 9) and that he had determined a deficiency in tax for 1925 of \$208,043.36, plus a 50% fraud penalty of \$108,803.61 based on income in the amount of \$890,000 from the operation of a brewery (R. 8-9). The Commissioner's statement of the deficiency (R. 9) showed that the \$890,000 embraced the additional income of \$53,990.46 covered by the closing agreement. Taxpayer petitioned the Board of Tax Appeals for a redetermination of this deficiency (R. 4-9).

The Board found that the Commissioner had established taxpayer's connection with the brewery in 1925 and that no income therefrom had been accounted for in his original return for that year. It also found that the income of at least \$890,000, disclosed by the evidence, represented "gross receipts" from sales of beer (R. 28-30).

Upon the issue made by the pleadings, whether the taxpayer had additional taxable income beyond the \$53,990.46 covered by the closing agreement (R. 11-15), the Commissioner, although his agents had investigated and reported on the additional taxable income covered by the agreement, did not call his agents as witnesses, or present their report, or other-



wise attempt to show the nature or source of the additional income covered by the closing agreement, whether from the brewery or elsewhere, or how he determined same before entering into that agreement, or taxpayer's conduct or participation in the matters connected with the closing agreement. Nor did the petitioner prove when he first knew of the additional income from the brewery.

The Board concluded that the Commissioner had sustained his burden of proving fraud or malfeasance or misrepresentation of fact in the closing agreement and was justified in setting it aside (R. 24-25, 28-29).

On this issue the Circuit Court reversed the Board, saying:

"As the proofs stood, and now stand, we are of opinion the government has not made out its case. There is no ground of proven fact to support a finding that the now alleged brewery liability was not included in the settlement, in the \$53,000 additional gross income of Kehoe. There is no proof of any other alleged liability on the part of Kehoe which led to this large addition. It will be noted that the Tax Board nowhere considered or discussed the two underlying, basic and important questions—first, what tax liability was considered and involved in the settlement made in pursuance of the revenue officer's examination. Second, on what liability, if not for the brewery, was the additional \$53,000 predicated? And lastly, and all important, the failure of the government to call its agent and show by him, if it could, that the brewery liability was not involved in the settlement" (R. 317).



**ARGUMENT.**

1. There was no substantial evidence to support the ultimate finding of the Board that there was fraud or malfeasance or misrepresentation of fact in the execution of the closing agreement.

The court below ~~reversed~~ the Board of Tax Appeals upon the issue of fraud or malfeasance or misrepresentation of fact materially affecting the determination and assessment of the tax covered by the closing agreement, and, rightly so, we contend, because the Board's ultimate finding was not supported by substantial evidence.

On this issue the Commissioner, petitioner here, had the burden of proof by statute.

Revenue Act of 1926 (Act of February 26, 1926; c. 27, 44 Stat. 9, 113, See: 26 U. S. C. A. 1660(b));

Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 872, 26 U. S. C. A. 612);

Jones v. Simpson, 116 U. S. 609, 615 (1886).

What is substantial evidence upon an issue of fraud? Not inference or presumption, nor even a bare preponderance which leaves the issue in doubt, but only that which is **clear, unequivocal and convincing**, and, of course, the best evidence of which the nature of the case will admit.

United States v. American Bell Telephone Co., 167 U. S. 224 (1897);

Farrar v. Churchill, 135 U. S. 609 (1890);



**Colorado Coal and Iron Co. v. United States,**  
123 U. S. 307 (1887);

**Maxwell Land-Grant Case,** 121 U. S. 325  
(1887);

**Jones v. Simpson,** *supra*;

**United States v. Arredondo,** 6 Peters 691, 21  
U. S. 689 (1832);

**Griffiths v. Commissioner,** 50 Fed. (2d) 782  
(C. C. A. 7, 1931);

**Budd v. Commissioner,** 43 Fed. (2d) 509 (C.  
C. A. 3, 1930);

**Kerbaugh v. Commissioner,** 29 B. T. A. 1014  
(1934).

Confronted with the closing agreement, which he had made with the taxpayer in 1928, and which, *prima facie*, finally and completely settled all controversies between them in respect of the 1925 tax liability<sup>1</sup>, the Commissioner could sustain his burden only by proving clearly and convincingly that the additional income of \$53,990.46 covered by the closing agreement, did not include respondent's taxable income from the brewery.

However, the Commissioner admits (petitioner's brief page 7) that "The nature of the additional income of \$53,990.46 on which this deficiency was based is not disclosed by the record." And why was this not disclosed? Because the Commissioner, while admitting (R. 10):

<sup>1</sup> **Wolverine Petroleum Corporation v. Commissioner,** 75 Fed. (2d) 593 (C. C. A. 8, 1935).



*Argument.*

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\* \* \* that about the month of September 1927 a representative of the Bureau of Internal Revenue made an investigation of the income tax liability of said petitioners for the year 1925; \* \* \* that the report of the investigation was prepared and forwarded to respondent at Washington, D. C., on about September 19, 1927, \* \* \* that the report showed a total tax liability (inclusive of the amount shown on the aforesaid return) of \$9,758.42 for said year or an additional tax for said year of \$9,563.86; \* \* \* that in the computation of such additional tax liability the representatives of the Bureau of Internal Revenue increased the taxable income for 1925 from \$19,198.33 as shown by the aforesaid return to \$73,188.79; \* \* \*

for some reason, as yet unexplained, did not call his investigating agent as a witness, or present his report, or otherwise attempt to show the nature or source of the additional income covered by the closing agreement, whether from the brewery or elsewhere, or how he determined same before entering into that agreement, or taxpayer's conduct or participation in the matters connected with that agreement.

Logically this was the primary and best evidence of which the nature of the case would admit and it was within petitioner's power to produce it. The absence of the primary evidence, not accounted for, raises a presumption that, if produced, it would give a complexion to this case adverse to the interest of the petitioner.



**Clifton v. United States**, 45 U. S. 242, 4 How. 242 (1846);

**Runkle v. Burnham**, 153 U. S. 216 (1894);

**Caminetti v. United States**, 242 U. S. 470 (1917);

**Bilokumsky v. Tod**, 263 U. S. 149 (1923);

**Mammoth Oil Co. v. United States**, 275 U. S. 13 (1927).

In

**Interstate Circuit, Inc. v. United States**, 306 U. S. 208 (1939),

this Court stated (at page 226):

"The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. \* \* \* Silence then becomes evidence of the most convincing character."

Nor is the petitioner here, an officer of the government, having the burden of proof, any less susceptible to the unfavorable presumption which arises from failure to produce the best evidence in his power than the ordinary litigant.

**Lau Hu Yuen v. United States**, 85 Fed. (2d) 327 (C. C. A. 9, 1936).

Petitioner attempts to circumvent his failure to produce witnesses to prove the nature of the additional income covered by the closing agreement by



pointing to certain evidence discussed on pages 17 to 23 of his brief. However, as will appear, this evidence is insufficient.

1. The evidence proving that the 1925 return was false and fraudulent with intent to evade tax is no evidence that the closing agreement executed January 27, 1928, was induced by fraud or misrepresentation.

It is well settled that the return and the agreement are separate, and fraud in one does not prove fraud in the other.

**Ingram v. Commissioner, 32 B. T. A. 1063 (1935), Affirmed in 87 Fed. (2d) 915 (C. C. A. 3, 1937).**

The fact that here there was a closing agreement subsequent to the filing of the original return indicates that the original return was incorrect, false or fraudulent. Unreported income was revealed to petitioner before the deficiency was assessed in 1927, or there would have been no additional assessment and no closing agreement. Since there was a discovery of unreported income at that time, and knowledge of this fact on the part of petitioner, on what theory shall it be presumed that such income was not from the brewery? Indeed, the only presumption is to the contrary—that, there being an investigation, it revealed the brewery income, which was promptly taxed.

2, 3 and 4. The evidence proving that the brewery was operated by taxpayer in the name of his em-



ployee, McGowan, from February, 1924 to February 28, 1927; and that his connection therewith was not known to the public generally, is no evidence that petitioner did not know of this relationship at the time of the execution of the closing agreement months later. If petitioner did not then know of the relationship, it was his duty to so testify. Otherwise there is no proof that he did not know.

5. The fact that taxpayer before late February, 1927, was planning to continue operating the brewery during 1927, and sought a permit in the name of John Carroll, but finally had McGowan turn the beer over to the National Prohibition Department in February, 1927, does not prove that the petitioner did not know all the facts at the time the closing agreement was executed. Indeed, this is evidence to the contrary, for it was subsequent to this time, in October of 1927, after an investigation by the Commissioner, that the notice of deficiency was sent, and on November 15, 1927, that the deficiency was assessed and paid (R. 5; 6, 10, 24; 25). And it was not until January 27, 1928, that the closing agreement was finally executed (R. 6, 7, 10, 11, 24, 26).

6. With regard to taxpayer's promise to reward McGowan with sums of money to insure his continued silence, the only evidence showing payments to McGowan, which will be found by an examination of petitioner's record references, covered occurrences before February 28, 1927, at which time McGowan's



connection with the brewery ceased. For example, the purchase of an automobile to send McGowan away on a trip (R. 83), instructions to keep his mouth shut (R. 101), and an injunction to deceive McQuade as to the true ownership of the brewery (R. 106), all occurred prior to February 28, 1927.

With regard to taxpayer's alleged promise to pay McGowan between \$60,000 and \$75,000, this was first made in 1925 (R. 131). The reason for the payment was for the "rap" McGowan thought he would have to take (R. 131) and for the investigation he had to undergo (R. 132). These promises related to occurrences in 1925. The only other testimony concerning the same sum of money was that of McGowan who testified that taxpayer, on the Friday before April 19, 1928, had promised to pay him that amount, if he had to go to jail for a violation of the National Prohibition Act (R. 138). It was to protect McGowan's wife and children and not to insure silence that this promise was made (R. 138). This is borne out by the fact that when the court decided McGowan did not have to go to jail, taxpayer did not make the payment to him.

7. The fact that taxpayer was not indicted with McGowan and McHugh in June, 1927, is certainly no evidence showing that petitioner did not know of taxpayer's connection with the brewery at the time the closing agreement was entered into in January, 1928. Since there was a deficiency assessment



in the fall immediately following, the contrary is the sole inference.

8. The fact that McGowan's break with taxpayer occurred after taxpayer refused to pay him and after the court handed down its decision of April 19, 1928, is certainly no evidence of petitioner's knowledge concerning taxpayer's interest in the brewery.

9. The fact that McGowan and his associates filed a claim in 1932 for having given the first information leading to the determination of the deficiency here involved, does not show that petitioner did not have knowledge of it until that time. For all this record discloses, this claim may have been or may be denied on the ground that it was not the first information.

Petitioner had made his own investigation in 1927 and in:

26 C. J. Sec. 75, 1163,

it is stated:

"Where the representee undertakes an independent investigation he is ordinarily chargeable with knowledge of all the facts which such an investigation should disclose. \* \* \*"

However, what the petitioner's investigation disclosed does not appear in this record (Petitioner's Brief, page 7). In addition there is no evidence to show that taxpayer failed to disclose income received by him from the brewery at the time the closing agreement was executed. The only mention



of "first information" in the record comes from the printing on the Treasury form used in making claim for reward and this is no evidence whatsoever (Exhibit 1).

On the contrary, the deficiency notice, admittedly sent to taxpayer on February 24, 1932 (R. 8-9), shows that the alleged income from the brewery in the sum of \$890,000 includes in it the additional income of \$53,990.46 on which the assessment of 1927, covered by the closing agreement, was based. In the deficiency notice (R. 9), petitioner adopts from the taxpayer's original tax return as "net income reported" the figure of \$19,198.33, adds to this as "other income not reported from operation of the P. F. McGowan Brewery of Edwardsville, Pa." the amount of \$890,000, and as "corrected net income" takes the total of these two items, \$909,198.33. This notice shows "tax previously assessed, original \$194.56" which is the tax on \$19,198.33, the net income originally reported. It also shows "tax previously assessed, additional \$9,563.86," which is the deficiency paid in 1927 on an increase in income of \$53,990.46, included in the closing agreement. Since this additional income, of \$53,990.46 is not specifically and separately referred to in the notice, it must be included in the \$890,000 designated as income from the brewery. In the light of this and in the absence of any evidence to the contrary produced by the petitioner, it must be assumed that he knew, at the time he entered into the closing agreement with the taxpayer, that this additional tax-



able income of \$53,990.46 had come from the operation of the brewery.

The fact that the present assessment is on an additional income of \$890,000 and the assessment of 1927 was on an added income of only \$53,990.46, does not prove that this is not the same income, because the \$890,000, as found by the Board, is gross receipts from the brewery (R. 12-13, 28, 29-30) with no deductions for the costs of operation, whereas the \$53,990.46 is net taxable income, and for all that appears in this record is the net taxable income of taxpayer from his interest in the brewery.

10. Petitioner argues that taxpayer's denial in the pleadings that he ever received any income from the operation of the brewery in 1925 indicates that income from the brewery<sup>2</sup> was not included in the closing agreement.

However, this does not follow, for the taxpayer in the pleadings also expressly refused to concede the correctness of the income forming the basis of the closing agreement (R. 6). In other words, both as to the assessment covered by the closing agreement and the present assessment, taxpayer denied that there was any additional income which he received for 1925, but in each case the petitioner thought differently. Therefore, a denial of receipt of income from the operation of the brewery does not indicate that the closing agreement did not cover such income.

Furthermore, the pleadings in this case raised two distinct issues, first, was there fraud or misrepresenta-



tion in connection with the closing agreement, and second, was the original return false and fraudulent. The facts supporting both these issues were pleaded affirmatively by petitioner in his answer and in order to frame these issues, as required by the rules of the Board, taxpayer in his reply made appropriate denials. To meet the facts which petitioner averred supporting the issue of fraud relating to the closing agreement, the taxpayer denied that he had received any income in 1925 in addition to that covered by the closing agreement, or that any such income had been concealed from petitioner. In meeting the issue of a false return, taxpayer denied the receipt of any income from the brewery.

It is a well settled principle of evidence that a party is forbidden to resort to his adversary's pleadings on one issue in a cause to prove another issue in the same cause.

**2 Wigmore on Evidence, Sec. 1064 (2).**

As stated by Mansfield, *C. J.*, in:

**Harington v. MacMorris, 5 Taunt. 228, 233 (1813):**

“\* \* \* it is every day's practice, that the defendant's language in one plea cannot be used to disprove another plea, as in the familiar instance I have given of trespass, and not guilty and a justification pleaded, where the justification would certainly, if admissible, prove the act, in case the reason of the justification fails. \* \* \*”



Moreover, the denial in the pleadings upon which petitioner bases his argument is a pleading only. It was not offered in evidence and, therefore, has no evidential value. If petitioner had offered this denial in evidence, it would have been evidence against him on the issue whether the original return was false. Since petitioner did not take the risk of offering this adverse testimony on this issue, he should not now be allowed to use it on the other issue.

In addition, taxpayer's denial in the pleadings of any connection with the brewery is not necessarily inconsistent with the conclusion that the additional income taxed in 1927 was in fact net income from the brewery. The taxpayer might very well have consented to the taxability of the brewery income in connection with the execution of the closing agreement and still have been reluctant to admit his connection with the brewery in a formal document open to public inspection, such as the pleadings in this case. This is especially true in view of the fact that, although compelled to pay tax on his income regardless of source, he is not required to make admissions which might incriminate or degrade him.

**United States v. Sullivan, 274 U. S. 259 (1927);  
Steinberg v. United States, 14 Fed. (2d) 564  
(C. C. A. 2, 1926).**

We fail to understand what force can be given to the insistence of taxpayer's counsel before the Board that petitioner sustain his burden of proving fraud both in the original return and in the closing agree-



ment (see petitioner's brief, page 22). Surely this is not evidence against their client.

At the hearing before the Board, petitioner, having the burden of proof, presented his evidence and rested (R. 308). The taxpayer thereupon moved, as he had moved previously, to limit the issues to the two questions on which petitioner had the burden of proof, namely, whether or not the original return was false and fraudulent with intent to evade tax and whether or not there was fraud, malfeasance or misrepresentation in connection with the closing agreement (R. 16-18, 43-44, 308-309).

In connection with this motion the taxpayer asked the Board to grant him the right to introduce testimony on the measure of his tax liability, if any, at a later date, provided the Board should hold the original return to be false and fraudulent with intent to evade tax or should set aside the closing agreement (R. 308-309).

The motion was denied and the request refused, whereupon taxpayer rested his case without offering evidence, on the ground that petitioner had failed to meet his burden (R. 309-310). The action of the Board in this regard was assigned as error in taxpayer's petition to the court below to review the Board's decision (R. 35-36).

11. Petitioner argues that the additional income on which the deficiency covered by the closing agreement was based, was about \$53,000, whereas the income



derived from illegal operations of the brewery was \$890,000. Here he intimates and later states (petitioner's brief, pages 27-28) that this \$890,000 is net income. This is contrary to the petitioner's allegations and the Board's finding. Petitioner alleged in his deficiency notice and pleadings that \$890,000 was gross receipts from brewery operations (R. 9, 12-13). The Board found *gross* receipts from the operation of the brewery in excess of \$890,000 (R. 28-30). The cost of operations was not considered. The Board stated (R. 30):

... \* \* \* we do not understand that the respondent [now petitioner], even under petitioner's [taxpayer's] theory, should also be required to prove his deductions for him."

Nowhere is there any finding that \$890,000 is *net* income or that the *net* income exceeded \$53,000.

○ The analysis of the evidence which petitioner advances to support the Board shows that there is in reality no such clear and convincing proof as is required. His tenuous arguments lack conviction and leave unanswered the primary questions: *What income did the closing agreement cover?* and *Why did the petitioner not produce the best evidence in his power and the only real evidence which could prove his case?* This is the vital factor which cuts clearly across all else in petitioner's case. The conclusion is inescapable that such evidence was adverse to petitioner's own interest, or he would have used it.



As the court below so aptly stated (R. 318):

“When the government is a litigant, it stands on the same basis as any other litigant and it is clear to us that if this was a case between private persons and one party was seeking to set aside a settlement made by the parties, he could not succeed where the failure to furnish was such as in the present case.”

2. The Court below did not usurp the jurisdiction of the Board of Tax Appeals.

Petitioner charges that the court below ignored substantial evidence supporting the Board's finding of fact and usurped the jurisdiction of the Board by weighing the evidence and substituting its own finding for that of the Board.

This charge is unfounded. What the court below did was to determine from the record whether there was any substantial evidence to support the finding of the Board that brewery income was omitted from the closing agreement through fraud or malfeasance or misrepresentation.

Whether there was any substantial evidence to support the ultimate finding of the Board is clearly a question of law, or at least a determination of a mixed question of law and fact, which is the subject of judicial review, and on such review the court may substitute its judgment for that of the Board.



**Bogardus v. Commissioner**, 302 U. S. 34, 38 (1937);

**Helvering v. Tex-Penn Co.**, 300 U. S. 481 (1937).

It is clear that the court below, in searching the record to determine whether there was substantial evidence to support the ultimate finding of the Board, was properly exercising its jurisdiction as defined by this Court and was not usurping the functions of the Board, as charged by petitioner.

The petitioner argues (brief, page 29) that the court below having concluded the evidence produced before the Board "permits two inferences to be drawn" (R. 316), it was the duty of the Board, not that of the court below, to draw one rather than the other inference and to declare the result.

It is plain that in its discussion on this point the court below did not intend to usurp the function of the Board. Rather it declared the familiar rule of law, applicable to both civil and criminal cases, that the burden of proof is not maintained by showing facts which are capable of two conflicting inferences. This is particularly so in the instant case. The burden being upon petitioner on the issue of fraud, his failure to produce the primary and best evidence of which the case would admit and within his power to produce, leaves the issue in doubt.

The failure of petitioner to show by the evidence in his possession<sup>1</sup> the nature of the additional income

<sup>1</sup>Such a failure, as here, was not present in *Helvering v. Lazarus*, No. 56, this Term, 84 Law. Ed. 171 (1939).



of \$53,990.46, covered by the closing agreement, raises the presumption that if produced it would have been adverse to him. If an inference is to be drawn, it can only be that which is adverse to petitioner, namely, that the additional income included brewery income.

Contrary to petitioner's assertion (brief, page 27), the court below made no assumption that income from the brewery was included in the additional income of \$53,990.46. Rather it concluded that petitioner's failure to produce the evidence in his possession of the nature of this income, necessitated a conclusion that he had not sustained his burden of proof. Such burden was not maintained, the court declared, by proof which left the issue in doubt.

### CONCLUSION.

The situation which petitioner seeks to overcome may be stated as follows: Assume that taxpayer's original return was false and fraudulent, and that taxpayer withheld income which he should have returned. Petitioner made an independent investigation, found the additional income, taxed it, and then made a closing agreement, taxpayer having paid the additional tax.

*Prima facie*, this closing agreement is valid and was entered into with full knowledge of all relevant facts, especially those facts which an investigation such as was made should have or did disclose. Therefore, *prima facie*, the closing agreement included all taxable income not reported originally and included



the net income from the brewery which petitioner now seeks to redetermine and assess. If the facts are otherwise, the burden was on the petitioner to so prove.

The petitioner failed to meet this burden. Admittedly he produced no evidence to show his knowledge of the additional income determined in 1927 or the nature or source thereof. Although the facts disclosed by his independent investigation were known to petitioner and must have shown the nature and source of the additional income of \$53,990.46, upon which the additional tax and interest of \$10,437.18 was assessed and paid, and constituted the best available evidence on the issue, petitioner neither produced the report of the revenue agents who made the investigation, nor summoned them as witnesses.

Neither the petitioner, nor his agents testified, that at the time the final closing agreement was executed, they lacked knowledge that the taxpayer had received income from the brewery operations, or that the taxable income on which the closing agreement was based did not include net income therefrom.

In the absence of such direct and explicit evidence, which petitioner could have produced, the court below properly reversed the board and it is respectfully submitted that this decision should be affirmed.

LEO W. WHITE,

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# SUPREME COURT OF THE UNITED STATES.

No. 419.—OCTOBER TERM, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,  
vs.  
John Kehoe.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 26, 1940.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Respondent Kehoe, in 1926, made an income tax return for 1925 and paid the amount computed thereon. In 1927, after inquiry concerning his affairs, the Commissioner assessed and collected an additional sum. Respondent waived appeal to the Board of Tax Appeals, and became party to a closing agreement under section 1106(b) Revenue Act 1926,<sup>1</sup> approved by the Secretary of the Treasury January 27, 1928.

In 1932 the Commissioner undertook to set aside this agreement and made a deficiency assessment of more than Two Hundred Thousand Dollars, also a fifty per cent penalty. Respondent appealed to the Board of Tax Appeals where he maintained there was no adequate proof to support the assessment. The Board held the Commissioner had adequately sustained the burden of showing fraud or malfeasance or misrepresentation of fact, and did not err in setting the agreement aside.

The matter then went to the Circuit Court of Appeals, Third Circuit, which ruled there was no adequate evidence to support the con-

<sup>1</sup> January 26, 1926, c. 27, 44 Stat. 9, 113—

Sec. 1106(b). If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.



elusion and judgment of the Board. The facts are much discussed in a majority and dissenting opinion 105 Fed. (2d) 552. Another narration of them seems unnecessary.

Under the rule often announced, the function of the Board of Tax Appeals is to weigh the evidence and declare the result as to matters properly before it. Upon review the court may not substitute its judgment of the facts for that of the Board. When there is substantial evidence to support the conclusion of the latter this must be accepted. *Helvering v. Rankin*, 295 U. S. 123, 131; *General Utilities Co. v. Helvering*, 296 U. S. 200, 206; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37, 40.

Here, upon evidence which we think is substantial (the dissenting member of the court below held the same view), the Board found fraud in fact which affected the closing agreement, and that the Commissioner properly set the contract aside. The court below should have accepted this finding of fact. As it failed so to do the challenged judgment must be reversed. The ruling of the Board is affirmed.

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*



